In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-597

ERNEST E. WEBBER, NELLYS F. WEBBER,
and ROBERT A. WALLER,
Appellants,

vs.

CITY OF SACRAMENTO, SACRAMENTO CITY COUNCIL,
SACRAMENTO CITY PLANNING COMMISSION, COUNTY OF
SACRAMENTO, SACRAMENTO COUNTY BOARD OF SUPERVISORS,
NATOMAS SEWER ASSESSMENT DISTRICT,
Appellees.

Appeal from the Supreme Court of California

JURISDICTIONAL STATEMENT

STEPHEN JAMES WAGNER
RICHARD F. DESMOND
LOUIS N. DESMOND
HAL D. BARTHOLOMEW
DESMOND, MILLER, DESMOND
& BARTHOLOMEW
1006-4th Street, Suite 900
Sacramento, California 95814
(916) 443-2051
Attorneys for Appellants

Associate Attorneys:
WILLIAM WADE NOLAN
LUIS F. MAGDALENO
GARY LIVAICH

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No.

ERNEST E. WEBBER, NELLYS F. WEBBER,
and ROBERT A. WALLER,
Appellants,

vs.

CITY OF SACRAMENTO, SACRAMENTO CITY COUNCIL, SACRAMENTO CITY PLANNING COMMISSION, COUNTY OF SACRAMENTO, SACRAMENTO COUNTY BOARD OF SUPERVISORS, NATOMAS SEWER ASSESSMENT DISTRICT,
Appellees.

Appeal from the Supreme Court of California

JURISDICTIONAL STATEMENT

I

THE OPINION BELOW

The Opinion and Decision of the Supreme Court of California is reported at 24 Cal.3d 862, ... Cal.Rptr. ....., ... P.2d ..... A copy is attached as Appendix A.[1]

[1]This appeal is being filed concurrently with the appeal of Donald W. Agins and Bonnie G. Agins, Appellants, vs. City of Tiburon, Appellee, and San Diego Gas & Electric Co. vs. City of San Diego.

II

STATEMENT OF THE GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. This is a civil action brought against the Appellees, City of Sacramento, et al., to recover just compensation for the alleged taking of private property. Alternatively, Appellants sought: 1) declaratory relief invalidating the ordinance which accomplished the taking of their land; 2) damages for breach of contract; 3) damages for unjust enrichment; 4) to estop Appellees from asserting that they had taken Appellants' property; and 5) that Appellees be mandated to set aside the ordinance which accomplished the taking of Appellants' land. Appellants charge that some twelve (12) years after a special assessment district was formed for the purposes of installing large trunk sewer lines across Appellants' property and the building of a sewage treatment plant in the area of Appellants' property, and some eight (8) years after Appellants' property was assessed $378,609.00, the Appellees enacted an Open-Space Element to the General Plan and an implementing ordinance which denies Appellants all use of their property for any purpose whatsoever and has also prevented any use or development of their property, or any part of it, and has thereby taken Appellants' property without due process of law and without just compensation (or any compensation) therefore in violation of Appellants' constitutional rights, particularly the Fifth and Fourteenth Amendments to the Constitution of the United States. The Decision of the Supreme Court of California was that even if Appellants could prove that the Open-Space Element deprived them of all value and use, they were not entitled to compensation.

The Supreme Court of California limited their recovery to one of mandate/injunctive relief.

Furthermore, Appellants charge that the formation of a special assessment district for sewer purposes and the levying of a special assessment in the sum of $378,609.00, for which over $350,000.00 (principal and interest) was actually paid by Appellants, and the subsequent denial of all use of the sewer lines, is an exaction from Appellants of the cost of a public improvement in substantial excess of the special benefits accruing to the property, and is a taking, under the guise of taxation, of private property for public use, without just compensation. The Supreme Court of California made a specific finding that the effect of the limitations imposed by the Open-Space Element and implementing ordinance removed all practical special benefits imposed by the assessment district,[2] and held that Appellants were not entitled to just compensation therefor, but rather that mandate/injunctive relief was Appellants' only remedy.

2. The Judgment sought to be reviewed is the Judgment of the Supreme Court of California, holding that Appellants have no right to just compensation for the taking of their private property for public use nor just compensation for the exaction from Appellants of the cost of a public improvement in substantial excess of the special benefits accruing to the property. That Judgment became final as to the Supreme Court of California on September 17, 1979. A Petition for Rehearing was not filed. The Notice of Appeal was filed by Appellants with the Supreme Court of California on October 1, 1979, and amended on October 2, 1979 and is attached hereto as Appendix B.

[2]Pages A-16-A-17 of the Opinion set forth in Appendix A.

3. Jurisdiction of the appeal is conferred upon this Court by Title 28 of the U.S. Code, Section 1257(2). This appeal draws in question the validity of the City of Sacramento's Open-Space Element and implementing ordinance on the ground of its being repugnant to the Constitution of the United States. The Judgment of the Supreme Court of California was in favor of its validity.

4. The cases sustaining jurisdiction of an appeal to this Court of the Judgment of a State Court, holding that no taking of private property has occurred and no compensation is payable to the property owner by reason of the regulatory activities of State or local governments, are:

Penn Central Transportation Company vs. City of New York, (1979) 438 U.S. 104, 98 S.Ct. 2646; 57 L.Ed.2d 631;

Moore vs. City of East Cleveland, Ohio, (1976) 431 U.S. 494; 97 S.Ct. 1932; and 52 L.Ed.2d 531;

Goldblatt vs. Town of Hempstead, New York, (1962) 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130;

Village of Euclid, Ohio vs. Ambler Realty Company, (1926) 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303;

Pennsylvania Coal Company vs. Mahon, (1922) 260 U.S. 393, 43 S.Ct. 158, and 67 L.Ed. 322.

The case sustaining jurisdiction of an appeal to this Court of the Judgment of a State Court, holding that no taking of private property has occurred and no compensation is payable to the property owner, by reason of a special assessment on the property owner in substantial excess of the special benefits imposed on the subject property, is:

Georgia Ry. & Electric Co. vs. City of Decatur, (1934) 295 U.S. 165, 55 S.Ct. 701, 79 L.Ed. 1365.

5. The right to compensation for the application of the City's Open-Space Element and implementing ordinance to Appellants' real property is here involved. The full text of the Open-Space Element as adopted by Resolution 860 of the Sacramento City Council entitled, "Open-Space Element Section Six," is set forth in Appendix C.[3] Sacramento City Ordinance No. 3283—Fourth Series is the implementing ordinance and is set forth in Appendix D.

III

QUESTIONS PRESENTED

1. Is it constitutionally permissible for a State Court to acknowledge that property involved in a special assessment district has been assessed a sum of money in substantial excess of the special benefits accruing to the property, yet to hold, unqualifiedly, that just compensation, provided for by the Fifth and Fourteenth Amendments, is *never* available as a remedy to a property owner who complains of such taking?

2. Is it constitutionally permissible for a State Court to hold, unqualifiedly, that just compensation for the taking of private property for a public use, provided for by the Fifth and Fourteenth Amendments, is *never* available as a remedy to a property owner who complains of such taking done by means of a regulation that, when applied to the landowner, is an admittedly unconstitutional and illegal regulation which effectively deprives him of his property?

3. Is it constitutionally permissible for a State Court to hold, unqualifiedly, that the only remedy of a landowner

[3]See pages C-12 to C-15 of Appendix C.

is to seek judicial invalidation of a land use regulation, without any provision whatever for recovery of just compensation (interim damages) for any temporary *de facto* taking that may occur while the regulation is in effect, where it has been found that the land use regulation in question is unconstitutional and illegal as applied?

4. On the facts at bench, where Appellants were assessed over $378,609.00, through a special assessment district, for trunk sewer lines and paid over $350,000.00 and Appellees denied all substantial use of said trunk sewer lines, while other similarly assessed property owners continue to use said work of public improvement, does the constitutional policy of fairness require that the ensuing economic burden be borne by the benefited public as a whole and not disproportionately be placed on Appellants?

5. Is it constitutionally permissible for a State Court to hold, without any factual inquiry whatever as to whether the regulated property is, in fact, economically or physically capable of being put to a use ostensibly permitted by the regulation, that as long as the regulation *says* that some uses are permitted, such statement, *ipso facto,* belies the landowner's allegation that, in fact, the regulation renders the property useless and worthless?

6. Where a State Legislature, by statute, declares that acquisition for open-space by cities is a public purpose for which public funds may be expended, and for which the power of eminent domain may be exercised, is it a deprivation of property without due process of law for a city to

make privately-owned land open-space by regulation, without acquiring any right therein or paying just compensation to the owners?

IV

STATEMENT OF FACTS OF THE CASE

A. THE RAISING OF FEDERAL ISSUES IN THE STATE COURT.

This appeal arises from the California Supreme Court's affirmance of the dismissal of Appellants' causes of action for inverse condemnation and a reversal of the dismissal of Appellants' cause of action for declaratory relief and mandate. Thus, the substantive facts are derived from Appellants' pleadings, which for purposes of review are taken as true and liberally construed under both Federal and California law.[4]

The Federal questions sought to be reviewed were raised in the California Court system initially by pleading a violation of the Fifth and Fourteenth Amendments of the United States Constitution in Appellants' First Amended Complaint filed in the Superior Court of the State of California, in and for the County of Sacramento, on February 27, 1975, specifically page 12, lines 9-12, which were incorporated by reference in all other causes of action.[5] The trial

---

[4]Under California law, facts alleged in the Complaint are treated as being true for the purpose of determining the sufficiency of those allegations. *Commercial Standard Insurance Company v. Bank of America,* (1976) 57 Cal.App.3d 241, 129 Cal.Rptr. 91. Zoning ordinances and city actions are a proper subject of the judicial notice. *City of Los Angeles v. Wolfe,* (1971) 6 Cal.3d 326, 331, 99 Cal. Rptr. 21, 491 P.2d 813.

[5]". . . justification and just compensation, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States and Article I, Section 19, of the Constitution of the State of California."

Court sustained the Appellees' First Demurrer to the Complaint, without leave to amend, on the ground that Appellants failed to state a cause of action. The Federal questions sought to be reviewed were raised at the appellate level, initially by Appellants' Opening Brief, filed in the Court of Appeal, Third Appellate District, State of California, on September 19, 1977. The issues were discussed generally throughout the entire brief, and specifically, at pages 12-13 and 15-17.[6] The intermediate Appellate Court found that there was an inverse condemnation and Appellants were entitled to monetary relief. However, the intermediate Appellate Court's Decision[7] was vacated by the granting of a hearing by the Supreme Court of the State of California. The Federal questions sought to be reviewed were raised at the highest appellate level in the Supreme Court of the State of California by a Response to Petition for Hearing, filed December 1, 1978, wherein the issues were discussed generally throughout the brief, and specifically at pages 4-6.[8] The Supreme Court of the State of California held that Appellants were not entitled to recover under the theory of inverse condemnation, notwithstanding the fact that said Court specifically found that Appellants were deprived of all benefits conferred upon them by the special assessment against their property.[9]

The Opinion of the Court below specifically refers to the Federal Constitution (page A-10 of the Opinion, attached

---

[6]A copy of said pages are attached hereto as Appendix E and Renumbered as E-1 to E-6.

[7]A copy of which is attached hereto as Appendix F.

[8]A copy of said pages are attached hereto as Appendix G and Renumbered as G-1 to G-4.

[9]See specifically the Court's language found at pages A-15 to A-16 Decision of the Supreme Court of the State of California, attached hereto as Appendix A.

hereto as Appendix A), and Federal case law (page A-15 of the Opinion) in so holding, and specifically construes the Federal Constitution to stand for the proposition that where there has been a "taking" by regulation, the only relief under the Federal Constitution is to invalidate the regulation.

B. SUMMARY OF FACTS.

Appellants brought action against a City, a County, and other public entities for inverse condemnation. Although Appellants' property was zoned agricultural, the County had laid large sewer trunk lines across Appellants' property and had built a sewage treatment plant in the area of Appellants' property. The sewer trunk lines and the treatment plant were designed to provide adequate sewage disposal for the planned future residential and commercial growth of the area in accordance with a general development plan adopted by the City. Assessments were made against properties served by the trunk lines in the amount of $3,137,462.00 and against Appellants' property in the amount of $378,609.00, of which over $350,000.00 has been paid by Appellants to date.

After legislation was enacted to preserve open-space land by the State Legislature, the City enacted an Open-Space Element and implementing ordinance which prevented any change of Appellants' property, and surrounding property, from its agricultural zoning or any special use inconsistent with the open-space designation in the general plan for an indefinite period, if not forever. The effect of said Open-Space Element and implementing ordinance was to deprive Appellants of all practical use of the sewer lines they were assessed and paid for.

C. GENERAL STATEMENTS OF FACTS.

Appellants' property is located in the Natomas area of Sacramento County, which is located to the north of the metropolitan area of the City of Sacramento (hereinafter referred to as "City."). Appellants are the owners of approximately 363 acres in the Natomas area and have been since the 1960's. Beginning in 1961, and in light of government determinations on various levels contemplating the imminent and continuing transition of the entire Natomas area to urban development and uses, the County of Sacramento (hereinafter referred to as "County"), undertook the establishment of a special sewer assessment district which was to undertake all measures necessary to install various trunk sewer lines and a sewer treatment facility in the area. Said improvements were designed to provide adequate sewer disposal facilities for the anticipated residential and commercial use of over 4,000 acres of planned residential development, including homes, shopping centers, and schools. The City, within whose then boundaries some of the contemplated improvements and benefits were to be installed, gave its formal consent and subsequently annexed the Natomas area into the City limits.

Work on the contemplated improvements were commenced in 1961 and completed in 1965. During this same general period of time, City and County adopted other plans and entered into other agreements reflecting and specifying the intended urban and commercial development of the Natomas area, including the Natomas General Development Plan (1962), the Sacramento Metropolitan Airport Plan (1962), various freeway agreements with the State

of California to provide for interchanges and on/off ramps designed to serve urban uses in the Natomas area generally, and Appellants' property in particular, a Northgate-Gardenland Community Plan (1965), and an Old City Community Plan (1966).

In April of 1965 the assessment on the project was confirmed. The total assessment was $3,137,462.00; of this, $378,609.00 was allocated to Appellants' property. Pursuant to statutory provisions, bonds were issued by the County and the Sewer District (hereinafter referred to as "District,") and Appellants thereon became obligated to make annual payments of principal and semi-annual payments of interest against the amounts allocated to the subject property.[10]

In 1970, the State Legislature of California enacted comprehensive legislation directed to the preservation of open-space lands within the State.[11] These sections of the Government Code specifically authorize the acquisition of private property by local government for open-space purposes. These open-space purposes were declared to be a public use and the use of the power of eminent domain was specifically authorized. (See Footnote [11].)

---

[10]Over $350,000.00 of principal and interest has presently been paid by Appellants.

[11]See California Government Code, Section 65560 et seq. The pertinent provisions of law are as follows:

§ 65560.

(a) "Local open-space plan" is the open-space element of a county or city general plan adopted by the board or council, either as the local open-space plan or as the interim local open-space plan adopted pursuant to Section 65563.

(b) "Open-space land" is any parcel or area of land or water which is essentially unimproved and devoted to an open-space use as defined in this section, and which is designated

By 1970, the State Legislature of California made it mandatory that local governments adopt general plans with an open-space element. Thereupon City, in 1972, imposed

on a local, regional or state open-space plan as any of the following:

(1) Open space for the preservation of natural resources including, but not limited to, areas required for the preservation of plant and animal life, including habitat for fish and wildlife species; areas required for ecologic and other scientific study purposes; rivers, streams, bays and estuaries; and coastal beaches, lakeshores, banks of rivers and streams, and watershed lands.

(2) Open space used for the managed production of resources, including but not limited to, forest lands, rangeland, agricultural lands and areas of economic importance for the production of food or fiber; areas required for recharge of ground water basins; bays, estuaries, marshes, rivers and streams which are important for the management of commercial fisheries; and areas containing major mineral deposits, including those in short supply.

(3) Open space for outdoor recreation, including but not limited to, areas of outstanding scenic, historic and cultural value; areas particularly suited for park and recreation purposes, including access to lakeshores, beaches, and rivers and streams; and areas which serve as links between major recreation and open-space reservations, including utility easements, banks of rivers and streams, trails, and scenic highway corridors.

(4) Open space for public health and safety, including, but not limited to, areas which require special management or regulation because of hazardous or special conditions such as earthquake fault zones, unstable soil areas, flood plains, watersheds, areas presenting high fire risks, areas required for the protection of water quality and water reservoirs and areas required for the protection and enhancement of air quality.

§ 65561.

The Legislature finds and declares as follows:

(a) That the preservation of open-space land, as defined in this article, is necessary not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources.

(d) That in order to assure that the interests of all its people are met in the orderly growth and development of the state and the preservation and conservation of its resources, it is necessary to provide for the development by the state,

a moratorium on building and development in the Natomas area and on or about July 7, 1973, adopted an "Open-Space Element" to its General Plan, indicating that a certain por-

regional agencies, counties and cities, including charter cities, of statewide coordinated plans for the conservation and preservation of open-space lands.

(e) That for these reasons this article is necessary for the promotion of the general welfare and for the protection of the public interest in open-space land.

§ 65562.

It is the intent of the Legislature in enacting this article:

(a) To assure that cities and counties recognize that open-space land is a limited and valuable resource which must be conserved wherever possible.

(b) To assure that every city and county will prepare and carry out open-space plans which, along with state and regional open-space plans, will accomplish the objectives of a comprehensive open-space program.

§ 65563.

On or before December 31, 1973, every city and county shall prepare, adopt and submit to the Secretary of the Resources Agency a local open-space plan for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiction. Every city and county shall by August 31, 1972, prepare, adopt and submit to the Secretary of the Resources Agency, an interim open-space plan, which shall be in effect until December 31, 1973, containing, but not limited to, the following:

(a) The officially adopted goals and policies which will guide the preparation and implementation of the open-space plan; and

(b) A program for orderly completion and adoption of the open-space plan by December 31, 1973, including a description of the methods by which open-space resources will be inventoried and conservation measures determined.

§ 65566.

Any action by a county or city by which open-space land or any interest therein is acquired or disposed of or its use restricted or regulated, whether or not pursuant to this part, must be consistent with the local open-space plan.

§ 65567.

No building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan.

tion of the Natomas area, including the subject property, be reserved for agricultural and open-space use. On the same day, City also amended its comprehensive zoning ordinance, setting up certain open-space zones, including one designated "Agricultural Zone-A" and one designated "Agricultural Open-Space-A-OS." Only very limited special uses were to be allowed in the open-space zone and then subject only to the granting of a special permit by the planning Commission.[12]

Shortly after the amendment of the General Plan and the zoning ordinance, Appellants attempted to file with City's Planning Commission a tentative subdivision map, an application to rezone, and an application to amend the General Plan. When the Planning Commission refused to accept all of these documents but the latter, and when subsequent attempts to obtain a hearing before the Planning Commission and the City Council proved unsuccessful, Appellants filed this action.

The subject property continues to be zoned agricultural and used for agricultural purposes.[13]

---

[12]The ordinance also provided: "No special permit shall be issued hereunder unless the Planning Commission first determines that such issuance would be in conformity with the zoning ordinance and the General Plan as they relate to open-space." It also stated: "D variances: Open-space regulations are to be literally and strictly interpreted and enforced to protect the public interests in the preservation and conservation of open-space lands and their immunities and the orderly urban development of such lands as required; hence, *variances will be granted only in extreme circumstances.*" (Emphasis added)

[13]As pointed out to the Appellate and Supreme Courts of California, the subject property cannot be successfully and economically farmed due to poor soil conditions. See Exhibit "A" to Opening Brief of Plaintiffs and Appellants filed September 19, 1977, Court of Appeal - Third District, State of California, said Exhibit is attached hereto as Appendix H.

The Appellees have demonstrated a clear intent that the subject property shall forever be restricted to agricultural use and that so long as the use of the property is so restricted, the sewer improvements and facilities in question will be of no benefit to Appellants. The sewer improvements and facilities, including the various trunk sewer lines and the sewage treatment plant, are currently operational and in use to transport and treat sewer affluent produced by other citizens of the City and County of Sacramento. (The facility treatment plant was processing 900,000 gallons of waste water per day as of 1974). None of the sewage thus transported and treated is produced on the subject property. The transportation and treatment of sewage is for the benefit of the general public of the City and County of Sacramento, Appellees herein.

Appellants' Complaint sets forth nine (9) causes of action. The First and Fifth seek damages for inverse condemnation for the taking of Appellants' property and the amounts paid under the sewer assessment. The Second and Third also seek damages, the Second for breach of contract and the Third on a theory of unjust enrichment in the amount of past and future sewer assessments. The Fourth alleges estoppel from denying Appellants the right to use their property for urban purposes. The Sixth and Seventh Causes of Action seek a Writ of Mandate requiring rezoning and an amendment of the General Plan. The Eighth Cause of Action, directed against Appellees, County and District only, seeks a rebate of past payments and an injunction against further collection of payments pursuant to the sewer assessment. The Ninth seeks declaratory relief relative to Appellants' future liability for payments under

the assessment and entitlement to recovery of past payments.

The trial Court consolidated this case with that of *Furey v. City of Sacramento* for hearing on Demurrers only; sustained Appellee's Demurrers to all Causes of Action in each case, and entered Judgment of Dismissal. Appellants appealed to the intermediate Court of Appeal, Third Appellate District, which rendered a Decision on October 12, 1978. Appellees' petitioned for hearing to the Supreme Court of the State of California, which granted hearing and rendered a Decision on August 17, 1979, a copy of which is attached hereto as Appendix A.

V

THE ISSUES PRESENTED HEREIN ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION FOR THEIR RESOLUTION

A. INTRODUCTION.

Over 50 years ago, Justice Holmes, speaking for the Court, warned that the Courts were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Company v. Mahon*, (1922) 260 U.S. 393, 416, 43 S.Ct. 158, 67 L.Ed. 322. The dangers foreseen by the Court in 1922 have not abated.

Since Justice Holmes' Opinion in *Pennsylvania Coal, supra*, the Court's enunciations of the constitutional rights

of a property owner under the Fifth Amendment of the United States Constitution have been few and far between.[14]

Unlike the Court's most recent pronouncement on the issues of "taking" and "just compensation" by regulation, in *Penn Central Transp. Co. v. New York City*, (1979) 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, where there was no dispute that the parcel of land occupied by Grand Central Terminal was capable of earning a reasonable return, the facts of the case at bench show that the regulation imposed by Appellees has denied all reasonable, beneficial, economic use, if not all use, of Appellants' property. The fact that, by governmental edict, the subject property was assessed and "improved" by the addition of immediately available sewer facilities and, by further governmental edict, the improvements have become realistically unavailable and of no beneficial use to those lands, in and of itself is so repugnant to the Fifth and Fourteenth Amendments of the United States Constitution so as to commend this case for review on its merits by this Court.

Further reasons for review by this Court are contained herein and summarized as follows:

1. The case at bench is a case of first impressions wherein government has with one hand imposed a benefit

---

[14]United States v. Central Eureka Mining Company, (1958) 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228; *Goldblatt v. Hempstead*, (1962) 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130; *Penn Central Transportation Company v. City of New York*, (1979) 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631; and, *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, (1979) 435 U.S. 1301, 99 S.Ct. 1171, 55 L.Ed.2d 489.

This is especially so when it is remembered that the property owner's right to just compensation is guaranteed by the same Fifth Amendment to the United States Constitution that guarantees alleged criminals various rights which this Court has discussed more than any other single issue over the last 25 years.

upon land, *exacting payment therefor*, then with the other hand has withdrawn all practical access and use to that benefit.

2. The Supreme Court of the State of California, or any other Court, simply cannot be allowed to flaunt clear Federal precedent and thereby violate the Fifth and Fourteenth Amendments of the Federal Constitution.

3. Aggrieved California property owners will not only be denied just compensation, but will be denied any practical remedy, interim damages and due process of law if the Opinion of the Supreme Court of the State of California is allowed to stand.

4. The necessary consequence permitting the Decision below to stand will be a massive shifting of local land use control controversies into the Federal Courts, thereby needlessly enlarging their case loads.

5. The Decision below ignores this Court's holdings on Federal constitutional grounds that an aggrieved property owner's primary remedy for uncompensated taking is monetary.

6. This Court should take the opportunity to fill the vacuum of legal principles in the field of inverse condemnation by noting probable jurisdiction in the case at bench.

B. THE CASE AT BENCH IS A CASE OF FIRST IMPRESSIONS WHEREIN GOVERNMENT HAS WITH ONE HAND IMPOSED A BENEFIT UPON LAND, EXACTING PAYMENT THEREFOR, THEN WITH THE OTHER HAND HAS WITHDRAWN ALL PRACTICAL ACCESS AND USE TO THAT BENEFIT.

The fundamental principle underlying involuntary special assessments to meet the cost of public improvement is that the property upon which the special assessment is imposed is peculiarly or specially benefited to the same extent as the assessment, and, therefore, the property owner does not, in fact, pay anything in excess of what he receives by reason of such improvement. (*Norwood v. Baker,* (1898) 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443. It is now abundantly clear that but for the *Special Benefit* to the property by way of increased value, the special assessment would be unconstitutional as unequal taxation. *Norwood v. Baker, supra.* California law is in accord. (*Spring Street Company v. City of Los Angeles,* (1915) 170 Cal. 24, 30, 149 P. 555; *Harrison v. Board of Supervisors,* (1975) 44 Cal.App.3d 852, 118 Cal. Rptr. 828. In summary, if there is no special benefit, there can be no special assessment.

Implicit in the use of the involuntary assessment procedure to finance public improvements is the ultimate availability of those improvements for beneficial use in connection with productive possession of the assessed lands. When, as in the case at bench, such availability is eliminated by governmental action, a property right has been taken for public use so as to be compensable in inverse condemnation. Appellants have been required *to pay for*

a sewer and treatment plant, now being used by the public in general but unavailable for their use, thus contributing more than their proper share to a public undertaking, contrary to the Court's pronouncement in *Armstrong v. U.S.*, (1959) 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554.

It is abundantly clear from the authorities cited herein that had the Appellants not been entitled to use the sewer lines when the original assessment was made, the assessment would be contrary to the State and Federal Constitutions. Why should the results be any different when some 7 years later (and over $350,000.00 being paid to Appellees), the City decides to remove the special benefit (the use of the sewers) from the subject property?

Indeed, this is the first case of its kind to come to this Court's attention, (or any Court for that matter), wherein government has with one hand imposed a benefit upon land, *exacting payment therefor*, then with the other hand has withdrawn all practical access and use to that benefit. It is this involuntary expenditure of monies by the landowner which distinguishes this case from all other "down zoning," "taking by regulation," or "regulatory" cases and which commends the case at bench to a review on the merits by this Court.

C. THE SUPREME COURT OF THE STATE OF CALIFORNIA, OR ANY OTHER COURT, SIMPLY CANNOT BE ALLOWED TO FLAUNT CLEAR FEDERAL PRECEDENT AND THEREBY VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

Whenever a State Court clearly and unequivocally flaunts and disregards the Federal Constitution, this Court has the authority, if not the duty, to review the State Court Decision and force the State to comply with the Federal Constitution.

Ever since the creation of "special assessment districts," it has been held that:

> "The exaction from the owner of private property of the cost of public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess,* a taking, under the guise of taxation, of property for public use without compensation." (*Norwood v. Baker,* (1898) 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443.

This proposition was clearly recognized by the Court below when it discussed the above passage from *Norwood* at page A-15 of its Decision, attached hereto as Appendix A, and specifically concluded that the Appellants were "wholly deprived of those benefits by the operation of the land-use regulations here in question—and this is to occur without their ever having entered into the actual enjoyment of any of these benefits." (At A-17). Thus, the Court below acknowledged that Appellants paid the cost of public improvement in substantial excess of the special benefits accruing to them. Yet the Court, appar-

ently disregarding (or perhaps flaunting) this Court's previous ruling, held that a cause of action for inverse condemnation could not *ever, under any circumstances,* be stated by Appellants where the taking is done by means of regulation which effectively deprives them of their property right or interest. (Opinion of the Court below attached hereto as Appendix A, page A-10. In the opinion of the Court below, the case of *Agins v. City of Tiburon,* (1979) 24 Cal.3d 266, 155 Cal.Rptr. 670, 595 P.2d 104, was controlling. The *Agins* case is currently on appeal before this Court and the Jurisdictional Statement was filed with this Court on October 12, 1979.

Appellants respectfully urge that intervention by this Court is badly needed, not only to relieve the confiscatory plight of Appellants, but also to provide principles for the Supreme Court of the State of California, and all Courts throughout this land, to use in "regulation" cases.

D. AGGRIEVED CALIFORNIA PROPERTY OWNERS WILL NOT ONLY BE DENIED JUST COMPENSATION, BUT WILL BE DENIED ANY PRACTICAL REMEDY AT ALL, INTERIM DAMAGES AND DUE PROCESS OF LAW IF THE OPINION OF THE SUPREME COURT OF THE STATE OF CALIFORNIA IS ALLOWED TO STAND.

After holding that the Appellants were not entitled to monetary relief, the Court below held that they were entitled to mandate, declaratory relief, or reassessment. In fact, no such remedies exist.

The Court should note that the Opinion deals with two separate entities, County/Sewer District and City. The

County/Sewer District (one and the same) have been given the option of reassessing Appellants' property. The Court clearly points out that this is *permissive* and not mandatory. To effectuate a reassessment under the circumstances would be to reimburse to all property owners so affected all monies paid into the assessment district. This is economically infeasible for the County/Sewer District.

On the other hand, if the County/Sewer District do not reassess, then Appellants' only relief is by way of mandate against City. Under present California law, mandate is totally ineffective. In fact, there have been no reported cases in California invalidating land use regulations on the ground of confiscation since 1958. (*Kissinger v. City of Los Angeles,* (1958) 161 Cal.App.2d 454, 327 P.2d 10. On the other hand, there have been numerous cases upholding the validity of legislation.[15] The frustration of the mandate remedy is seen clearly in *Selby Realty Company v. City of Buenaventura,* (1973) 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111, where the California Supreme Court held that the "law" which is to be tested in a mandamus proceeding is the law as it happens to be immediately prior to final judicial determination. Thus, the "law" that is complained of may be changed prior to the trial of the matter, and the new "law" is the one the Court must be concerned with. As has been put succinctly by James Longtin, one-time City Attorney for the City of Thousand Oaks, Cali-

---

[15]See *HFH, Ltd. v. Superior Court,* (1975) 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237, Cert. Den. 425 U.S. 904; *State v. Superior Court (VETA),* (1974) 12 Cal.3d 237, 115 Cal.Rptr. 497, 524 P.2d 1281; *Selby Realty Company v. City of Buenaventura,* 10 Cal. 3d 110, 109 Cal.Rptr. 799, 514 P.2d 111; *Brown v. City of Fremont,* (1977) 75 Cal.App.3d 141, 142 Cal.Rptr. 46; *Smith v. State of California,* 50 Cal.App.3d 529, 123 Cal.Rptr. 745, Hrg. Den.

fornia and author of, *"California Land Use Regulations,"* published in 1977, as he was in the process of instructing his fellow public entity attorneys:

> "If legal preventative maintenance (Ed. note, confiscatory regulation) does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent Supreme Court case of *Selby v. City of San Buenaventura,* 10 Cal.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment to make it more reasonable, more restrictive, or whatever, and everybody starts over again."

Thus, practically speaking, a California landowner is afforded no relief through a mandamus proceeding.

Not only is the landowner denied relief by way of mandate, but also denied any interim damages as a result of the public entity's action. In the case at bench, Appellants attempted to file a tentative subdivision map and accompanying documents in 1973. Appellees refused to allow the filing of said documents and this litigation commenced. As of the date of the writing of this document, the Appellants have been unable to use or develop their property for urban purposes, or any part of it. In essence, if the Open-Space Element and implemeting ordinance is unconstitutional and may not be applied against the Appellants' property, as suggested by the opinion of the Court below, the Appellees have "rented" Appellants' property or obtained an "option" to purchase Appellants' property without compensating Appellants for said use. It has recently

been held, in California, the measure of damages under similar circumstances is the fair rental value of the property, plus interest during the time that the public entity has deprived the property owner of the highest and best use of the property. *Jones v. People, ex rel. Department of Transportation,* (1978) 22 Cal.2d 144, 151-155, 148 Cal.Rptr. 640, 583 P.2d 165.

Assuming, for illustrative purposes only, that Appellants' property is worth $1,000.00 per acre, (the exact per acreage assessment for the sewers), Appellants have been deprived the fair rental value of their 363 acres, to wit, the fair rental value of $363,000.00 worth of property. When the *Jones, supra,* case was retried by these authors, a ten percent (10%) rental value was applied to the then fair market value to determine the fair rental value. Using the same analogy, *for illustrative purposes only,* the Appellants would then have been deprived $36,300.00 (10% of $363,000.00), each and every year, plus interest at the legal rate thereon. It does not take a mathematical expert to see that by passing the Open-Space Element and implementing ordinance the Appellees have cost the Appellants a significant amount of money.[16]

The opinion of the Court below further denies Appellants due process of law by assuming, contrary to the facts pled, that Appellants' property has long been devoted to a reasonable use, to wit, agricultural use. (See text of Opinion at A-11) This is contrary to this Court's enuncia-

---

[16]The illustration assumes that the subject property is worth $1,000.00 per acre. In fact, Appellants were assessed $1,000.00 per acre for the sewer improvements. In reality, the Appellants' property is worth several times the amount set forth in the hypothetical set forth above if they were able to use it for urban purposes.

tion in *Nectow v. Cambridge,* (1928) 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842, holding such determinations turn on the facts of the specific case and not on assumptions made by an appellate court.

The Decision of the Supreme Court of the State of California once again ignores all precedents set by this Court with regard to the Fifth and Fourteenth Amendments of the United States Constitution. This Court should take this opportunity to firmly instruct and inform the Supreme Court of the State of California and the Courts of all jurisdictions that said conduct is improper and not within the guidelines set forth in the Fifth and Fourteenth Amendments of the Federal Constitution.

It is respectfully submitted that this Court should note probable jurisdiction in the case at bench based upon the holding of the Court below which denies Appellants, and all property owners throughout the State of California, any interim damages for an admittedly confiscatory and unconstitutional regulation.

E. THE NECESSARY CONSEQUENCE PERMITTING THE DECISION BELOW TO STAND WILL BE A MASSIVE SHIFTING OF LOCAL LAND USE CONTROL CONTROVERSIES INTO THE FEDERAL COURTS, THEREBY NEEDLESSLY ENLARGING THEIR CASE LOADS.

Perhaps the most important reason for this Court to review the case at bench on its merits is that the affirmance of the Decision by the Supreme Court of the State of California will cause all property owners, where there is a confiscatory regulation on their property, to bring

their request for relief into the Federal Court system since, as previously discussed, non-monetary remedies will not provide the aggrieved landowners with meaningful relief.

Traditionally, the Federal Courts have abstained from hearing cases involving local land use policies.

However, as the remedies in the State Court become so restricted as to be meaningless, the Federal Court system will be forced to hear the types of cases that they have attempted to avoid hearing (on the ground that the State should be permitted to construe and interpret local land use regulations).

This is even more obvious when it is recognized that the Federal Court system has acknowledged the property owner's plea for monetary relief as promised in the Constitution. Most recently, this Court, in *Lake Country v. Tahoe Regional Planning Agency,* (1979) 435 U.S. 1301; 99 S.Ct. 1171; 55 L.Ed.2d 489 has acknowledged such relief as have other lower Federal Courts in numerous other cases.[17] Thus, by affirming the Opinion below, this Court will, by a stroke of the pen, effectively transfer into Federal Court most, if not all, of the difficult *local* land use controversies. Whether such shift of litigation from the State to the Federal Court is good or bad is for this Court to decide. Therefore, it is respectfully submitted that this Court grant probable jurisdiction and allow all parties to brief this matter in its entirety.

---

[17]See, as a mere sample, *Gordon v. City of Warren* (1978, 6th Circuit), 579 F.2d 386; *Barbaccia v. County of Santa Clara,* (1978, N.D. Cal.) 451 F.Supp. 260; *Sanfilipo v. County of Santa Cruz,* (1976, N.D. Cal.), 415 F.Supp. 1340; *Dahl v. City of Palo Alto,* (1974, N.D. Cal.) 372 F.Supp. 647.

F. THE DECISION BELOW IGNORES THIS COURT'S HOLDINGS ON FEDERAL CONSTITUTIONAL GROUNDS THAT AN AGGRIEVED PROPERTY OWNER'S PRIMARY REMEDY FOR UNCOMPENSATED TAKING IS MONETARY.

The issue of the primary remedy for a landowner whose property has been taken without just compensation has been addressed by this Court on several occasions.[18]

The rationale for this Court's deciding that monetary relief is preferable to injunctive relief is that where a governmental entity pursues a legitimate public objective which is subsequently construed to be a "taking" without just compensation, the Court will undo the wrong, to wit, the failure to pay just compensation, and rather than invalidating the entire course of action, the Court will provide compensation. As the Court in *Hurley v. Kincaid* (1932) 285 U.S. 95, 104, 52 S.Ct. 267, 76 L.Ed. 637, held:

> "Even where the remedy of law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass

[18]*Hurley v. Kincaid*, (1932) 285 U.S. 95, 52 S.Ct. 267, 76 L.Ed. 637, which reversed the lower Court's Decision granting injunctive relief in favor of a monetary remedy; *Dugan v. Rank*, (1963) 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed. 2d 1, where it was held that inverse condemnation damages and not invalidation or injunction, constitutes the proper constitutional remedy; *Regional Reorganization Act Cases* (1974), 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed. 2d 320, where this Court held that equitable relief was not proper as long as access to compensation remained by way of inverse condemnation under the *Tucker Act; U.S. v. Gerlach Livestock Company*, (1950) 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231, which held that where the State of California destroyed certain private water rights, such rights remained compensible and monetary relief was proper rather than an injunction or other specified relief.

> the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showings that its intervention is necessary in order to prevent an irreparable injury." (Fn. 3)

The Decision of the Court below once again ignores all precedents set by this Court with regard to the Fifth and Fourteenth Amendments of the United States Constitution. This Court should take this opportunity to firmly instruct and inform the Supreme Court of the State of California and the Courts of all jurisdictions that said conduct is improper and not within the guidelines set forth in the Fifth and Fourteenth Amendments of the Federal Constitution.

G. THIS COURT SHOULD TAKE THE OPPORTUNITY TO FILL THE VACUUM OF LEGAL PRINCIPLES IN THE FIELD OF INVERSE CONDEMNATION BY NOTING PROBABLE JURISDICTION IN THE CASE AT BENCH.

As this Court has noted in its most recent pronunciation in the area of inverse condemnation," (t)his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." (*Penn Central Transp. Company v. New York City*, (1979) 438 US 104, 98 S.Ct. 2646; 57 L.Ed.2d 631. Thus, the problem of confiscatory land use regulation continues to be one of the most difficult and growing areas of constitutional litigation in the country. As can be seen by the opinion of the Supreme Court

of the State of California in the case at bench and in *Agins v. City of Tiburon,* (1979) 24 C.3d 266, 155 Cal.Rptr. 670, 595 P.2d 104, (Jurisdictional Statement filed with this Court on October 12, 1979) an aggrieved property owner in the State of California has absolutely no right to damages in inverse condemnation for admittedly confiscatory land use regulations. Yet the same property owner in New Jersey (See *Lomarch Corp. v. City of Englewood,* (1968, N.J.) 237 A.2d 81, Wisconsin (*Kmiec v. Town of Spider Lake,* (1973, Wis.) 211 N.W.2d 471, Ohio (*Village of Willoughby Hills v. Corrigan,* (1972) 29 Ohio St. 239, 278 N.E. 2d 658, *Cert.Den.Sub.Nom.*, Florida (*Moviematic Industries, Inc. v. Dade County,* (1977 Fla.App.) 349 So.2d 667, Texas (*City of Austin v. Teague,* (1978, Tex.) 570 S.W.2d 389), New York (*Fred F. French Investing Company v. City of New York,* (1976) 39 N.Y.2d 587, 350 N.E.2d 381, Kansas (*Ventures In Property I v. City of Wichita,* (1979, Kan.) 594 P.2d 671, or Colorado (*Hermanson v. Board of County Commissioners, etc.,* (1979, Colo. App.) 595 P.2d 694, 695 (Cert. Den.) would be entitled to relief. Why should the remedy for violation of the Federal Constitution be different in one state than another?

The area of concern becomes even greater when the concept of acquisition of private property for a passive public use (e.g., open-space) becomes more and more apparent. At first blush, one would say that our governmental entities would not unconstitutionally deprive a landowner of his property for open-space purposes without just compensation. But this is clearly not the case.[19]

To allow such Decisions as the case at bench to stand will allow unscrupulous governmental entities to take, by confiscatory regulation, property without parting with a thin dime if economically reasonable use of the desired land is prohibited.

In short, land use regulation, like any other species of governmental regulation can be, and is being, abused. The victims of the abuse are entitled to the protection of their constitutional rights, which are clearly being denied by the Supreme Court of the State of California. Simply stated, this Court has not set forth any guidelines for the lower Courts around the country to use in determining the validity of confiscatory regulations.

Appellants respectfully urge that the intervention by this Court is badly needed, not only to relieve the particular problems of Appellants, but also to provide further insight into the principles of inverse condemnation and confiscatory regulations which will permit similar controversies to be handled without unreasonable cost, delay, uncertainty, and injustice.

---

[19]See such cases as *Peacock v. County of Sacramento,* (1969) 271 Cal.App.2d 845, 77 Cal.Rptr. 391, where after deciding it was too expensive to purchase the property at the current fair market value for the purposes of open-space adjacent to an airport, the County imposed height limitations, restricting all use of the subject property, save the growing of grass, while *ad valorem* taxes were increased every year; *Arastra Limited Partnership v. City of Palo Alto,* (1975 N.D. Cal.) 401 F.Supp. 962, where after deciding that it wanted to acquire the subject property for a park, the City set out to do so without compensation by means of imposing a complex scheme of "regulations" which, in fact, made the property unusable. (Please note that following this Decision, the City settled the case for $4,500,000.00 whereupon the Opinion of the District Court was vacated by Stipulation—417 F.Supp. 962.)

CONCLUSION

The undisputed facts in the case at bench show that Appellees formed a special assessment district and assessed Appellants and the subject property $378,609.00, of which over $350,000.00 has been paid. The purpose of the district was to install large trunk sewer lines across Appellant's property and build a sewage treatment plant and when Appellants were ready to improve their property, the special benefit, the sewer lines, would be available to Appellants. Some 8 years and $350,000.00 of Appellants' monies later, Appellees pass a regulation which prohibits Appellants from using their land for any purpose other than agricultural. The Supreme Court of the State of California found the regulation was unreasonable and therefore, unconstitutional as applied to Appellants' property, and yet held that Appellants did not state a cause of action in inverse condemnation.

Short of the onset of a new Ice Age, one could hardly imagine a more clumsy, more insensitive obstruction of the free use of private property. The Appellees' action created an economic No-Man's Land. It was a gross governmental interference with property interests of the private citizens who had invested their life savings in the subject property. Since 1973, Appellees have kept the free market place in the Natomas area in manacles. One can only speculate how many dozens or hundreds of helpless property owners suffered from Appellees' callousness.

Inverse condemnation doctrines are verbalized judicial attempts to balance governmental and private interests. The public entity should have opportunity to plan and regulate the growth in their community. When, as here,

the planning and regulation becomes confiscatory and creates 6 years, or more, of economic havoc, the public entity ought to pay.

Among the rights inhering in land ownership are the right to offer it for sale on the free market place, use, transfer and develop property. By the regulations imposed upon the subject property, Appellees have thrust the subject property into a 6 year economic limbo, isolating it from the free market. The Appellees' conduct directly, specially and injuriously impaired Appellants' right to use or develop their property.

The Opinion below would permit Appellees to walk away from the economic havoc they have created. The mild mandate concept evolved by the Court below emasculates the constitutional demand for just compensation. To say that the Appellants are not entitled to interim damages for the 6 years of Appellee-imposed economic idleness is to deny the facts of life under cover of legalistic verbiage.

"Implicit in the use of the involuntary assessment procedures to finance public improvement is the ultimate availability of those improvements for beneficial use in connection with productive possession of the assessed lands. . . . When such availability is eliminated by governmental action, . . . a property right has been taken for public use so as to be compensible in inverse condemnation. (Appellants) here have been required to *pay for* a sewer and treatment plant now unavailable for their use, thus contributing more than their 'proper share to a public under-

taking,' the long-range preservation and conservation of open-space land."[20]

In the final analysis, the reason Appellants ought to be able to recover monetary damages in inverse condemnation is simply a matter of equity and fairness.

Mr. and Mrs. Webber and Mr. Waller pray that probable jurisdiction be noted.

Dated: October 2, 1979.

DESMOND, MILLER, DESMOND
& BARTHOLOMEW

By: STEPHEN JAMES WAGNER

By: RICHARD F. DESMOND

By: LOUIS N. DESMOND

By: HAL D. BARTHOLOMEW

(Appendices follow)

[20]This quote is taken from the now superceded Intermediate Appellate Decision in the case at bench, a copy of which is attached hereto as Appendix F and is found at page F-18.

Appendices

INDEX TO APPENDICES

APPENDIX A

S. F. No. 23,967

In the Supreme Court
of the
State of California

LAWRENCE E. FUREY, as Trustee, etc., Plaintiff and Appellant, v. CITY OF SACRAMENTO et al., Defendants and Respondents.

ERNEST E. WEBBER et al., Plaintiffs and Appellants, v. CITY OF SACRAMENTO et al., Defendants and Respondents.

OPINION

MANUEL, J.—In these two cases, which have been consolidated for purposes of appeal, we face the question, among others, whether a city, having participated with other public entities in the creation of a special sewer assessment district in a county area intended for transition to urban development, and later having annexed the area, may thereafter amend its general plan and enact an open space ordinance in a manner precluding certain of the owners of property subject to assessment from realizing all or substantially all benefits from the underlying public improvement for an indefinite period of time. We conclude that in the circumstances here alleged it may not, and that in the absence of appropriate reassessment or other relief being afforded, the amendment and ordinance may not be applied to such owners and their properties.

I

Plaintiffs appeal from judgments of dismissal entered following the sustaining of demurrers, without leave to amend, to their complaints seeking damages for inverse condemnation, declaratory and injunctive relief, and mandate. In the following statement of the facts we accept all properly pleaded allegations of the complaints as true for purposes of this appeal. (See, e.g., *Serrano* v. *Priest* (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241].)

The so-called Natomas area of Sacramento County (County) is an area of approximately 15 square miles, devoted primarily to agricultural uses, which is located to the north of the metropolitan area of the City of Sacramento (City). Since 1960, Lawrence E. Furey and his predecessor Joseph A. Maun, trustees, (Furey) has held title to approximately 1,157 acres of land in the portion of this area presently lying to the north of Interstate 880. Ernest E. Webber, Nellys F. Webber, and Robert E. Waller (Webber) have owned approximately 363 acres in the same portion of the Natomas area for a similar length of time. Beginning in 1961, and in light of government determinations on various levels contemplating the imminent and continuing transition of the entire Natomas area to urban development and uses, County, upon a finding of public interest and convenience, undertook the establishment of a special sewer assessment district therein under the provisions of the Improvement Act of 1911 (Sts. & Hy. Code, § 5000 et seq.), which district was to undertake all measures necessary to install various trunk sewer lines and a sewer treatment facility in the area. Said improvements were

designed to provide adequate sewer disposal facilities for the anticipated residential and commercial use of over 4,000 acres of planned residential development, including homes, shopping centers and schools. City, within whose then boundaries some of the contemplated improvements and benefits were to be installed, gave its formal consent, and on October 7, 1961, the Natomas area was annexed to City. In January 1962, by action of the board of supervisors of County, defendant Natomas Sanitation District of Sacramento County (District)[1] was formed as a "county sanitation district" pursuant to the provisions of section 4700 et seq. of the Health and Safety Code and since that time has exercised the powers granted to such a district by the provisions of section 4738 et seq. of the same code; on the same date said district assumed ownership, control, management and supervision of the sewer facilities to be built.[2]

Work on the contemplated improvements was commenced in 1961 and completed in 1965. During this same general period of time City and County adopted other plans and entered into other agreements reflecting and specifying the intended urban and commercial development of the Natomas area, including the Natomas General Development Plan (1962), the Sacramento Metropolitan

---

[1]In the Webber action the district is referred to as the Natomas Sewer Assessment District rather than the Natomas Sanitation District of Sacramento County. It was indicated at oral argument that these two districts are one and the same.

[2]In October 1974, defendant Sacramento Regional County Sanitation District assumed partial ownership, management and control of the subject sewer facilities and also agreed to assume all prior and subsequent liabilities of District. For convenience, hereafter both districts will be referred to collectively.

Airport Plan (1962), various freeway agreements with planned interchanges for the servicing of urban uses, a Northgate Gardenland community plan (1965), and an Old City community plan (1966).

In April 1965, the assessment on the project was confirmed. The total assessment was $3,137,462; of this $840,644.72 was allocated to the Furey property and $378,609 to the Webber property. Pursuant to the provisions of the Improvement Act of 1911 bonds were issued by County and plaintiffs thereupon became obligated to make and presently continue to make annual payments of principal and semi-annual payments of interest against the amounts allocated to their respective properties.[3]

In 1970 the Legislature enacted comprehensive legislation directed to the preservation of open-space lands within the state. (Gov. Code, § 65560 et seq.) As amended Government Code section 65563 required that every city and county (apparently including charter cities such as Sacramento—see Gov. Code, §§ 65700, 65302, subd. (e)) by December 31, 1973, adopt a local open-space plan "for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiction," and that an interim plan be adopted by August 31, 1972. Thereupon defendants City, County, and District met on numerous occasions for the purpose of complying with these

[3]It is alleged in the Furey complaint that the Fureys have paid over $502,000 in principal and $324,000 in interest (or a total of approximately $826,000) on their bonded obligation. The Webber complaint does not allege the amount paid by them to the date of filig. In their answer to the petition for hearing before this court the Webbers state that a total of over $350,000 has presently been paid.

requirements. These meetings were carried on with full knowledge of (1) the various existing plans affecting the Natomas area and contemplating its transition to urban use, and (2) the construction and assessment which had previously been carried on by District. Nevertheless it was determined that the Natomas area be included in the open-space plan. In 1972 City imposed a moratorium on building and development in the area, and on or about July 7, 1973, it adopted an "Open Space Element" to its general plan indicating that that portion of the Natomas area lying to the north of Interstate 880 was to be reserved for agricultural and open-space uses. This element provided: "Lands that are recommended for retention in the Open Space Plan as an agricultural preserve are located in the Natomas area north of Interstate 880. Of the total 6,934 acres within the City in this area, the 3,582 acres north of Del Paso Road are recommended for a permanent agricultural designation while the approximately 3,172 acres of agricultural land south of Del Paso Road are recommended for an agriculture-urban reserve designation. Lands designated for permanent agriculture are not anticipated, at the present rate of urban growth locally, to be required for urban land uses within the time span of the City's General Plan; while lands designated for agriculture-urban reserve could be needed in part or wholly for contiguous urban growth outward from the City core within the next twenty year period."

The Open Space Element also contained recommendations to "[r]eview City agriculture-urban reserve areas at the time of General Plan updating every 5 to 7 years and adjust thse areas if contiguous urban growth warrants the

change" and to "[r]eview permanent agriculture areas every 20 years and adjust these areas if warranted."

All of the lands in question are within the agricultural reserve thus created. Approximately four-fifths of the Furey property lies within the "permanent agriculture" area; the remainder of the Furey property and all of the Webber property lies within the "agricultural-urban reserve" area.

On the date of its adoption of the Open Space Element of its general plan City also amended its comprehensive zoning ordinance, setting up certain open-space zones including one designated "Agricultural Zone—A" and one designated "Agricultural Open Space—A-OS." Only the following special uses were to be allowed in these open-space zones, subject to the granting of a special permit by the planning commission: "a. Accessory dwellings for persons employed for agricultural purposes on the subject property. b. Animal kennels and hospitals. c. Animal or poultry slaughtering or processing facilities. d. Outdoor amusement enterprises. e. Livestock feed or sales yards. f. Stands for sale of agricultural products. g. Mineral extraction operations. h. Riding stables. i. Golf courses or driving ranges. j. Public utilities or facilities." The ordinance also provided: "No special permit shall be issued hereunder unless the Planning Commission first determines that such issuance would be in conformity with the Zoning Ordinance and the General Plan as they relate to open space." It also stated: "D. Variances: Open space regulations are to be literally and strictly interpreted and enforced to protect the public interest in the preservation and

conservation of open space lands and their amenities and the orderly urban development of such lands as required; hence, variances will be granted only in extreme circumstances."

Shortly after the amendment of the general plan and the zoning ordinance Webber attempted to file with City's planning commission a tentative subdivision map, an application to rezone, and an application to amend the general plan. When the planning commission refused to accept all of these but the latter, and when subsequent attempts to obtain a hearing before the planning commission and the city council proved unsuccessful, the Webber action was filed. Furey apparently made no attempt to pursue these administrative remedies, but in May 1974, submitted written requests to City and County that a reassessment of the costs of the subject improvements be undertaken, that all amounts paid under the assessment be refunded, and that all future payments be paid out of public funds, all pursuant to the provisions of the Improvement Act of 1911, specifically sections 5550 through 5565 of the Streets and Highways Code. No action was taken by defendants pursuant to these requests.

The lands here in question continue to be zoned agricultural and are used for agricultural purposes as they have at all times in the past.[4] It is alleged that defendants intend that such property shall forever be restricted to such uses, and that so long as the use of the property is so restricted

---

[4]Defendants permitted Webber to develop a certain portion of the affected property as a mobile home park in 1970. This portion of the property, which presently utilizes the subject sewage facilities, is apparently not involved in this litigation.

the sewer improvements and facilities in question will be of no benefit to plaintiffs. The sewer improvements and facilities, including the various trunk sewer lines and the sewage treatment plant, are currently operational and in use to transport and treat sewer effluent produced by other citizens of defendants City and County.[5] None of the sewage thus transported and treated is produced on the subject property. It is alleged that such transportation and treatment of sewage is for the benefit of the general public of defendants City and County.

In October 1974, Furey filed an action in the United States District Court for the Eastern District of California seeking damages for inverse condemnation, refund of sewer assessments, and declaratory relief. Defendants' subsequent motion to abstain from the exercise of federal jurisdiction was granted, however, and the court stayed further action pending a final determination of state issues in the state courts, reserving jurisdiction to determine any issues of federal constitutional law if necessary.

II

The Furey complaint sets forth five causes of action. The first seeks damages for inverse condemnation based upon the difference between the value of the Furey property if used for residential or commercial purposes and its value if restricted to agricultural uses; alternatively it is alleged that defendants are estopped from denying

[5]The Sacramento Area Regional Planning Commission's 1974 Water and Waste Management Plan and Program, of which we take judicial notice (Evid. Code, § 452, subd. (b)), states at page 34 that in 1974 the Natomas Treatment Facility was processing 900,000 gallons of waste water per day.

plaintiff the right to use the subject property for residential or commercial purposes. The second, third, and fourth seek recovery of amounts paid or to be paid as principal and interest on the bonds issued to finance the subject improvements; again, theories of inverse condemnation and estoppel are relied upon, but it is also urged that unlawful assessment out of proportion to benefits accruing to assessed property has occurred. The fifth cause of action seeks a declaration that the open-space plan and zoning ordinance are void and unlawful and an injunction against actions preventing residential and commercial development.

The Webber complaint sets forth nine causes of action. The first and fifth seek damages for inverse condemnation measured by the diminution in value of the Webber property and the amounts paid or to be paid under the sewer assessments. The second and third also seek damages, the second for breach of contract and the third on a theory of unjust enrichment in the amount of past and future sewer assessments. The fourth alleges estoppel from denying plaintiff the right to use his property for urban purposes. The sixth and seventh causes of action seek a writ of mandate requiring rezoning and an amendment of the general plan. The eighth cause of action, directed against defendants County and District only, seeks a rebate of past payments and an injunction against further collection of payments pursuant to the sewer assessment. The ninth seeks declaratory relief relative to plaintiff's future liability for payments under the assessment and entitlement to recovery of past payments.

The trial court, consolidating the cases for hearing on demurrers only, sustained defendants' demurrers to all

causes of action in each case and entered judgments of dismissal. Plaintiffs appeal.

III

We are satisfied that the adoption of the open space element of City's general plan, together with the strong wording of the amended zoning ordinance, essentially foreclosed all administrative discretion relative to the use of plaintiffs' property for any purpose other than those permitted under the agricultural open space legislation. Webber's unsuccessful efforts to obtain administrative relief underscore this fact. Furey, by unsuccessfully requesting reassessment pursuant to the provisions of Streets and Highways Code section 5550 et seq., exhausted that avenue of approach. Accordingly, we conclude that all available administrative remedies were exhausted by plaintiffs prior to seeking judicial relief.

IV

Plaintiffs urge that they are entitled to damages for inverse condemnation owing to diminution in the value of their lands resulting from limitations upon its use imposed by City's amendment of its general plan and zoning ordinance. As we pointed out in the recent case of *Agins* v. *City of Tiburon* (1979) 24 Cal.3d 266 [— Cal.Rptr. —, — P.2d —], however, such relief is not available for these purposes. Rather the aggrieved landowner is limited to showing, through an action for declaratory relief or mandate, that the legislation or regulation in question, viewed either on its face or as applied, is an invalid exercise of the police power in violation of the Fifth Amendment to the United States Constitution and article I, section 19,

of the California Constitution. This, we held, may be shown only by demonstrating that the effect of the regulation "is to deprive the landowner of substantially all reasonable use of his property." (*Id.*, at p. 277.) Plaintiffs have not alleged any such effect in the instant case. Rather they have alleged that their lands, which have for many years been used for agricultural purposes, must continue to be so used in the future as a result of City's actions. It cannot be said that agricultural use of lands long devoted to that purpose is other than a reasonable use. Accordingly plaintiffs have failed to allege facts entitling them to relief by way of declaratory relief or mandate on this basis.

It is clear from the foregoing that plaintiffs have not stated facts which, if shown to be true, would entitle them to relief by way of inverse condemnation or mandate on account of *diminution in the value of their lands*[6] which is alleged to have been brought about by City's amendment of its general plan and zoning ordinance. This is not to say, however, that they are entitled to no relief whatsoever in the circumstances here presented, for the instant case involves an aspect which goes beyond the matter of mere diminution in the value of land due to reasonable regulation. If the facts herein are demonstrated at trial to be as

---

[6]Nor do we believe that there is any merit to plaintiff's strenuous arguments by which they, drawing an analogy to certain land access cases (e.g., *Jones vs. People* ex rel. *Dept. of Transportation* (1978) 22 Cal.3d 144, 151 [148 Cal.Rptr. 640, 583 P.2d 165]), urge that they are entitled to damages for inverse condemnation of their asserted right of access to the improvements in question. Even if we assume, for purposes of argument, that such an analogy is sound, the fact remains that plaintiffs *have* access to the subject improvements. Their true complaint is that they have not been permitted to utilize their lands in a manner which would allow them to make the maximum use of that access.

alleged in the complaints, we are faced with a situation in which local government bodies, pursuing with commendable zeal the philosophy and purposes of one decade, have set into motion the machinery of public improvement in such a manner as to involve a relatively small number of property owners in the total financing thereof, only to reverse their field in the following decade and, pursuing with equal zeal the perhaps more enlightened philosophy and purposes of that later time, remove from some of those owners the ability to effectively utilize the improvement so created. Although as we have pointed out the need for government flexibility to meet the needs and requirements of each emerging generation precludes fulfilling, in all but the most extreme cases, the expectations of value brought about by earlier official moods and actions, we think that entirely different considerations must govern when those moods and actions have operated to bring about substantial financial commitment on the part of taxpayers included in a special assessment district who are precluded by later governmental action from realizing substantially all special benefits generated by the district.

The Improvement Act of 1911 makes explicit provision for situations of this general character, in which events or determinations occurring subsequent to the original assessment operate to render it unjust. Chapter 20 of part 3 of the act (Sts. & Hy. Code, § 5550 et seq.),[7] entitled "Reassessments to Relieve Owners," provides in its initial section that the legislative body of a city or county (see § 5006) has the power "at any time before the assessments

[7]Hereafter, unless otherwise noted, all section references are to the Streets and Highways Code.

levied under this division are fully paid and discharged to order a reassessment under the terms and conditions set forth in this chapter." (§ 5550.) The following two sections of the chapter describe two specific situations in which this power may be exercised, namely when an improvement previously the subject of special assessment is found to provide general rather than special benefits (§ 5551) and when such an improvement has been sold as surplus property (§ 5551.5); it is not suggested, however, that these are to be the only situations in which a reassessment may be ordered. It is further provided that any such reassessment "need not be in any prescribed form but shall refer to the original assessment filed . . . and shall be accompanied by a diagram showing the lots to be reassessed and their relation to the work." (§ 5553.) Provision is also made for published notice (§§ 5554, 5555) and a hearing at which "the legislative body shall consider all objections to the reassessment and may correct inequalities or mistakes therein." (§ 5556.) Following confirmation of the reassessment it is to be recorded with the diagram, the street superintendent to "note opposite the several assessments in the original assessment that have been displaced by the reassessment the fact that the reassessment has been made . . . [and to] credit upon such reassessments all payments theretofore made upon the original assessment or upon the bonds issued to represent the original assessment." (§ 5557.)

After providing for collection, payment, and enforcement (§ 5558) and the protection of outstanding bonds (§ 5559), the chapter goes on to consider the matter of refund. Section 5560 provides in relevant part: "Whenever prior to the confirmation of the reassessment any

principal payments have been made on any assessment, or on any bond issue to represent any such assessment, the owner of record of the property against which such assessment was levied . . . shall be entitled to receive a refund of an amount of the difference between the original assessment and the reassessment in the proportion that such payments made by him bears to the original assessment, with respect to the lot or parcel of land for which such payments were made. The balance of any such appropriation, as determined by the reassessment, shall be credited pro rata to the bonds in payment thereof, applying such payment first to the interest due and then upon the principal. Thereafter the treasurer shall pay to the holder of each bond the payment so credited from the bond and assessment redemption fund. The treasurer is hereby authorized and directed to make all payments of refunds as authorized by this chapter." In subsequent sections provision is made for notice of refund (§ 5561), the filing of claims for refund (§ 5562), the limitation of actions to contest the validity of the reassessment (§ 5563), and meeting any reassessment costs (§ 5564). Finally, in section 5565, it is stated that "[t]he making of any reassessment pursuant to this chapter in any proceedings shall not constitute a bar or limit the right to make further reassessments as the legislative body may determine."

Defendants quite properly point out, however, that sections 5550, 5551, and 5551.5 speak in permissive terms, the latter two sections indicating that the legislative body "may, in its discretion" order reassessment to relieve owners. It also appears that City and County, by failing to act upon the Furey request that such a reassessment be

undertaken, have essentially exercised their discretion in the matter by refusing relief. It has been held that a writ of mandate to compel reassessment will not lie in such circumstances. (*Gordon* v. *City of Los Angeles* (1944) 63 Cal.App.2d 812, 816 [147 P.2d 961].)

We made it clear in the *Agins* case, however, that a land-use regulation may not be applied to one otherwise subject to it if to do so would result in a taking of property without just compensation.

And as the United States Supreme Court said in *Norwood* v. *Baker* (1898) 172 U.S. 269 at page 279 [43 L.Ed. 443 at p. 447, 19 S.Ct. 187], "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking under the guise of taxation of private property for public use without compensation." (See also *Spring Street Co.* v. *City of Los Angeles* (1915) 170 Cal. 24, 30 [148 P. 217]; *Harrison* v. *Board of Supervisors* (1975) 44 Cal.App.3d 852 [118 Cal. Rptr. 828].) Although it is true that in most cases the determination of special benefit is made at the time of the confirmation and spreading of the assessment (see, e.g., *Dawson* v. *Town of Los Altos Hills* (1976) 16 Cal.3d 676, 688-689 [129 Cal.Rptr. 97, 547 P.2d 1337]), we believe that in circumstances such as those here alleged, wherein both the undertaking of the public improvement and the action foreclosing any realistic access to the special benefits generated by it have resulted from government initiative,[8] a

[8]To be distinguished in this respect are cases in which the construction of public improvements is undertaken on the initiative of the property owner himself. (See, e.g., Wat. Code, §§ 30200 et seq., 34150 et seq.) In such a situation, barring strong evidence of

present reexamination of the relationship between assessment and benefit is constitutionally required.

The cases of *Reichelderfer* v. *Quinn* (1932) 287 U.S. 315 [77 L.Ed. 331, 53 S.Ct. 177, 83 A.L.R. 1429] and *Ritzman* v. *City of Los Angeles* (1940) 38 Cal.App.2d 470 [101 Cal. Rptr. 541], which are heavily relied upon by defendants, do not in our view support the contrary position urged by them. In those cases landowners who had been included in special assessment districts created for the purchase and maintenance of public parklands adjoining their land sought to enjoin the construction of improvements thereon which were alleged to be inconsistent with recreational uses. It was held that the special benefits accruing by virtue of the assessment did not include the right to insist against the government that the lands be forever used as a park rather than for some other purpose consistent with the public interest. (*Reichelderfer, supra*, at p. 321 [77 L.Ed. at p. 335]; *Ritzman, supra*, at p. 476.)

We quite agree with this conclusion. We are not here concerned, however, with a case in which one subject to a special assessment seeks to prevent a governmental entity from utilizing the subject improvements for some public purpose other than that contemplated at the time of the original assessment. The improvements here in question are currently operational for the very purpose for which they were designed and built, i.e., the transportation and

governmental inducement or promotion, the property owner stands in the position of a volunteer who, in the event of intervening regulation barring use of the improvement in the public interest, cannot be heard to complain of the loss of his investment. (See and cf. *Avco Community Developers, Inc.* v. *South Coast Regional Com.* (1976) 17 Cal.3d 785, 789-790 [132 Cal.Rptr. 386, 553 P.2d 546].)

treatment of sewage effluent. Many other properties within (if not without) the assessment district are presently enjoying their benefits. (See fn. 5, *ante*, and accompanying text.) And yet plaintiffs, who taken together were allocated substantially more than one-third of the total assessment (or an aggregate *principal* amount of well over $1.2 million), are to be wholly deprived of those benefits by the operation of the land-use regulations here in question—and this is to occur without their ever having entered into the actual enjoyment of any of these benefits.

The aforementioned *Reichelderfer* and *Ritzman* cases are clearly distinguishable on this latter basis as well. There was no showing in those cases that the effect of the projects was to prospectively deprive the landowners of all or substantially all of the benefit underlying the assessments paid by them. It appears that the parks in question had been in existence for some time prior to the governmental action complained of—and thus had provided full benefits for a substantial period of time—and additionally there was no indication that the effect of the projects would be to substantially extinguish all recreational uses in those portions of the park remaining after their completion. Here, on the other hand, it is alleged that the effect of the governmental action in question is to remove for an indefinite time, if not forever, the possibility of deriving any significant benefit whatsoever from the subject improvement. Although it must be conceded that plaintiffs enjoyed benefits of a theoretical nature due to the availability to them of the sewer facilities prior to the passage of the open-space limitations—which benefits might properly be considered in any future reassessment—the alleged

effect of those limitations in removing all practical special benefit must, in the circumstances of this case, be held to give rise to a right to appropriate relief.

It is further urged, however, that plaintiffs are foreclosed from judicial relief by their failure to mount a timely challenge to the original assessment. In this respect defendants place their primary reliance on the terms of section 5660, which provides in substance that no action to set aside or correct or enjoin the collection of any assessment may be maintained after the expiration of 30 days after recording thereof. We do not believe, however, that this provision and others like it may be raised as a bar against plaintiffs in the circumstances of this case.

A similar situation arose in the case of *Smoke Rise, Inc.* v. *Washington Suburban San. Com'n.* (D.Md. 1975) 400 F.Supp. 1369. There certain real estate developers sought to challenge the constitutional and statutory validity of various sewer hookup moratoria. It was held that the moratoria, which resulted from an order of the state department of health, were constitutional in all respects but that the developers, who were subject to a front foot benefit assessment for the construction of sewer lines and facilities, were deprived of due process by a requirement that any application for exemption from the assessment be made contemporaneously with the notice of assessment. "In the view of this Court," it was held, "it is inconsistent with basic notions of fair play and due process to say that a person whose property was assessed . . . in 1968 cannot apply for and receive in 1972 an exemption from the front foot benefit charge as a result of the Secretary's 1970

moratoria orders, which orders could not reasonably have been anticipated in 1968." (400 F.Supp. at p. 1394.)

Here, as in *Smoke Rise,* plaintiffs had little reason to complain of the subject assessment when it was spread. At that time all applicable governmental planning contemplated the transition of their properties, along with all other properties in the area, to urban uses in which the special benefits contemplated by the improvement and assessment would be fully capable of realization by them. Nor do we believe that plaintiffs' failure to develop their properties in the years intervening between the improvement and assessment and City's passage of its open-space limitation should be held to bar present complaint by them. The Furey property was held in trust at all relevant times, and the complaint contains allegations to the effect that sound business decisions based upon housing demand and other relevant factors precluded development by the trustee at any time prior to City's action. Webber, although not subject to trust restrictions, allegedly proceeded in light of the same business realities, and we find no basis for distinction from Furey in this respect. In short, we conclude that the judicial challenge here mounted must be considered timely in all respects.

It remains to consider the remedy which is appropriate in the circumstances. As we have indicated above, plaintiffs have failed to allege facts which would entitle them to damages by way of inverse condemnation—either by virtue of diminution in the value of their lands as a result of city's open-space regulations or for limitation of their asserted right of access to the improvements in question. (See fn. 6, *ante,* and accompanying text.) We have also

explained that they are not entitled to relief from the offending regulation by way of declaratory relief or mandate due to limitations imposed thereby on the uses to which they may put their lands. We have concluded, however, that if the facts are shown to be as alleged they should be entitled to the latter form of relief on other grounds—i.e., the effect of those same regulations upon plaintiffs' ability to realize the special benefits generated by the assessment district in which they have been included and to which they have substantially contributed. We hold, therefore, that if the allegations made in the complaints before us are demonstrated at trial, relief would lie by way of declaratory relief or mandate precluding the application of the subject land-use regulations to plaintiffs. We also believe, however, that prior to the issuance of any judgment the trial court should afford defendants a reasonable opportunity to make use of the reassessment procedures to which we have adverted above (see text accompanying and following fn. 7, *ante*) or to take other appropriate action directed toward ameliorating in equitable fashion the gross inequities which here appear.[9] Any such action should be taken into account by the trial court in its final determination.

The judgments are, and each of them is, reversed and the causes are remanded to the trial court for further proceedings in light of this opinion.

Bird, C. J., Tobriner, J., Mosk, J., Clark, J., Richardson, J., and Newman, J., concurred.

[9]Any such reassessment, of course, would be without prejudice to further reassessment in light of future changes in planning policy having the effect of permitting plaintiffs and others similarly situated to derive practical benefit from the subject improvements. (See § 5565.)

APPENDIX B

Desmond, Miller, Desmond & Bartholomew
1006 Fourth Street, Suite 900
Sacramento, California 95814
Telephone: (916) 443-2051
Attorneys for Plaintiffs and Appellants
Ernest E. Webber et al.

[Filed October 1, 1979]

In the Supreme Court
of the
State of California

No. S.F. 23967

Lawrence E. Furey, as Trustee, etc., Plaintiff and Appellant, v. City of Sacramento, et al., Defendants and Respondents.	Super Ct, Nos. 252325 and 249487
Ernest E. Webber, et al., Plaintiffs and Appellants, v. City of Sacramento, et al., Defendants and Respondents.	

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Notice Is Hereby Given that Plaintiffs and Appellants Ernest E. Webber, Nellys F. Webber and Robert E. Waller appeal from the Judgment of this Court in the above-

entitled matter in its entirety, which was entered on August 17, 1979.

Dated: October 1, 1979

DESMOND, MILLER, DESMOND & BARTHOLOMEW
By: /s/ STEPHEN JAMES WAGNER
Stephen James Wagner

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within above entitled action; my business address is 1006 Fourth Street, Suite 900, Sacramento, Calif.

On October 1, 1979, I served the within NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento, California, addressed as follows:

Thelen, Marrin, Johnson & Bridges
Two Embarcadero Center
San Francisco, California 94111
Attn: Mr. Richard M. Sims, III

Mr. Mark I. Weinberger
Deputy Attorney General
State of California
110 West A Street, Suite 600
San Diego, California 92101

Mr. L.J. Savage
Deputy City Attorney
812 Tenth Street
Sacramento, California 95814

Stumbos and Mason
721 Ninth Street
Sacramento, California 95814

I certify under penalty of perjury that the foregoing is true and correct.

Executed on September 27, 1979, at Sacramento, California.

/s/ JUDY K. BOGGS
Judy K. Boggs

Desmond, Miller, Desmond
& Bartholomew
1006 Fourth Street, Suite 900
Sacramento, California 95814
Telephone: (916) 443-2051
Attorneys for Plaintiffs and Appellants
Ernest E. Webber, et al.

[Filed October 2, 1979]

In the Supreme Court
of the
State of California

S.F. 23967

Lawrence E. Furey, as Trustee, etc., Plaintiff and Appellant, v. City of Sacramento, et al., Defendants and Respondents.	Super Ct. Nos. 252325 and 249487
Ernest E. Webber, et al., Plaintiffs and Appellants, v. City of Sacramento, et al., Defendants and Respondents.	

AMENDMENT OF NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Plaintiffs and Appellants amend their Notice of Appeal filed herein on October 1, 1979, in the following respects:

By striking lines 21 through 24 in their entirety and substituting in their place the following language:

"Notice is hereby given that Plaintiffs and Appellants Ernest E. Webber, Nellys F. Webber and Robert E. Waller appeal from the Judgment of this Court in the above-entitled matter in its entirety, said Judgment being entered on August 17, 1979. Said Appeal is being taken to the United States Supreme Court pursuant to Title 28 of the U.S. Code, Section 1257(2)."

Dated: October 2, 1979.

DESMOND, MILLER, DESMOND
& BARTHOLOMEW
By: STEPHEN JAMES WAGNER

DECLARATION OF SERVICE BY MAIL

I, the undersigned say:

I am a citizen of the United States, over the age of eighteen years, a resident of the County of Sacramento and not a party to this action or proceedings; that my business address is 1006 Fourth Street, Sacramento, California 95814, which is the place at which the attorneys for Appellants have their offices.

That on the 2nd day of October, 1979, I enclosed three (3) true copies of the attached AMENDMENT OF NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT in an envelope for each of the persons named below, addressed to him at the address set out immediately below his respective name, which is the place he has his office, sealed said envelope, deposited the same in the United States Mail at the City of Sacramento, County of Sacramento, State of California with postage thereon fully prepaid and that there is delivery service by United States Mail at the place so addressed or there is regular communication by mail between the said place of mailing and the place so addressed:

NEWLAN, MATHENY & POIDMORE
350 University Avenue
Sacramento, California

Thelen, Marrin, Johnson & Bridges
Two Embarcadero Center
San Francisco, California 94111
Attn: Mr. Richard M. Simms, III

Mr. Mark I. Weinberger
Deputy Attorney General
State of California
110 West A Street, Suite 600
San Diego, California 92101

Mr. L.J. Savage
Deputy City Attorney
812 Tenth Street
Sacramento, California 95814

Stumbos and Mason
721 Ninth Street
Sacramento, California 95814

All parties required to be served have been served and such service is in compliance with United States Supreme Court Rule 33. I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on October 2, 1979, at Sacramento, California.

/s/ JUDY K. BOGGS

Judy K. Boggs

APPENDIX C

Adopted by The Sacramento City Council on date of

June 7, 1973

RESOLUTION ADOPTING THE OPEN SPACE ELEMENT OF THE CITY OF SACRAMENTO GENERAL PLAN

WHEREAS, Government Code Section 65700 (all code section references are to the Government Code unless otherwise specified) requires charter cities to adopt a general plan; and

WHEREAS, Section 65302 requires the general plan to contain an open space element; and

WHEREAS, Section 65563 requires every city to prepare, adopt and submit to the Secretary of the Resources Agency a local open-space plan for the comprehensive and long range preservation of open space land within its jurisdiction by June 30, 1973; and

WHEREAS, pursuant to City Ordinance No. 3177 ("Interim" Open Space Element) and Articles 5, 6 and 10.5 of Chapter 3 of Title 7 of the California Government Code, the Sacramento City Planning Commission duly noticed and held public hearings on the subject of the proposed Open Space Element of the Sacramento City General Plan on the 8th and 15th days of May, 1973, and by City Planning Commission Resolution No. 98 has recommended approval of the attached Open Space Element of the Sacramento City General Plan, and

WHEREAS, the Sacramento City Council duly noticed and held a public hearing on the 7th day of June, 1973, and have considered and deliberated on the testimony so received,

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SACRAMENTO:

That this Council hereby adopts the attached Open Space Element for the Sacramento City General Plan.

/s/
Mayor

ATTEST:

/s/
City Clerk

[Seal]

Certified as true copy
of Resolution No. 860
October 1, 1979

OPEN SPACE ELEMENT

SECTION SIX

Approved by the
City Planning Commission
Resolution 98—May 22, 1973

Adopted by the
City Council
Resolution 860—June 7, 1973

OPEN SPACE ELEMENT

INTRODUCTION

Importance of open space. Open space is of vital importance in an urban setting such as Sacramento because it provides relief, utility and contrast within the urban setting of homes, offices, stores and factories. Psychologically, man needs to know that he can turn to open space for recreation, mental and physical well-being, and aesthetic satisfaction. Open space lands can protect man from the dangers caused by earthquakes, fire and floods, as well as provide man with an opportunity to study and enjoy native plant and animal communities. Further, open space in an urban area can have utility for the production of food, visual relief and openness. It also has importance in shaping and structuring the urban development pattern.

Sacramento has long been cognizant of these important aspects of open space. In so doing, the City has provided significant contributions to the physical, economic and social fabric of the overall community. It is recognized, however, that improvement is continually needed if Sacramento is to remain a desirable place to live.

Purpose of an open space plan. The purpose of an open space plan for Sacramento is to enunciate which lands in the overall community, both public and private, should be kept as open space, to identify appropriate open space needs and uses for open lands, and to provide direction in implementing the desired open space system.

The plan also serves to coordinate and more effectively organize existing planning by both the public and private sectors of the overall community. At the present time, Federal, State, regional, County and City agencies all are

involved in various aspects of open space planning both within and immediately adjacent to Sacramento. The activities of the City Recreation and Parks Department have traditionally been oriented toward outdoor recreation types of open space . . . a significantly important function but one that does not address itself to planning for the preservation of resource management lands for example.

This open space plan is furthermore a response to increased community interest. The Planning Commission's appointment of an advisory Open Space Committee to recommend policies, goals and types of open space lands was partially because of their own interest in seeing that the public at large had significant input into the planning process and partially because of expressed interest in open space planning by active individuals and organizations of Sacramento.

Finally, preparation of an open space plan for Sacramento was made necessary by amendments to State planning law. Briefly stated, Section 65563 of Article 10.5 of the California Government Code requires that every city shall prepare, adopt, and submit to the Secretary of the Resources Agency a local open space plan for the comprehensive and long range preservation and conservation of open space land within its jurisdiction on or before June 30, 1973. To assure that the open space plan is meaningful, the Legislature further requires under Section 65910 of Article 4 that an open space zoning ordinance be adopted by the same date.

It was the finding and declaration of the California Legislature in enacting these provisions that:

1—Preservation of open space land is necessary not only for the maintenance of the economy of the State, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources.

2—Discouraging premature and unnecessary conversion of open space land to urban uses is a matter of public interest and will be of benefit to urban dwellers because it will discourage noncontiguous development patterns which unnecessarily increase the costs of community services to community residents.

3—Anticipated increases in the population of the State demands that cities, counties, and the State at the earliest possible date make definite plans for the preservation of valuable open space land and take positive action to carry out such plans by the adoption and strict administration of laws, ordinances, rules and regulations as authorized.

4—In order to assure that the interests of all its people are met in the orderly growth and development of the State and the preservation and conservation of its resources, it is necessary to provide for the development by the State, regional agencies, counties and cities, including charter cities, coordinated plans for the conservation and preservation of open space lands.

5—For these reasons Article 10.5 is necessary for the promotion of the general welfare and for the protection of the public interest in open space land.

By State definition, "open space land" is any parcel or area of land or water which is essentially unimproved and devoted to an open space use and which is designated on a local open space plan as any of the following:

1—Natural resource land

2—Agricultural land

3—Recreation land

4—Scenic land

5—Watershed or ground water recharge land

6—Wildlife habitat

Open space land as designated by the advisory Open Space Committee includes the following:

1—Open space for managed resource production

2—Open space for resource preservation

3—Open space for outdoor recreation

4—Open space for public health and safety

5—Open space for visual amenity

6—Open space for utility

Relationship of open space element to conservation element. Many open space uses are by their very nature closely interrelated with other elements of the General Plan. This is particularly true when considering the content of the Conservation Element. Specifically, the Conservation Element is addressed to the need of conserving such resources as wildlife and its habitats, productive agricultural soils, surface and ground-water resources, mineral

supplies, etc., as well as the need to protect the environment in general from improperly located and constructed development. The Conservation Element emphasizes management of land resources. In order that these resources may be protected, the policies and recommendations of the Open Space Element are an essential and inseparable aspect of the Conservation Element. The Conservation Element, therefore, suggests various resources and their location in the planning area which should be conserved through appropriate policies and land development practices, while the Open Space Element identifies certain areas which, because of their important natural resource value *or other value to the overall* community, should be preserved as open space.

SUMMARY OF MAJOR FINDINGS, OPEN SPACE GOALS, GENERAL POLICIES, RECOMMENDATIONS

MAJOR FINDINGS

1—Sacramento has an abundant base of existing and potential open space lands. This resource base includes open space for managed resource production, resource preservation, outdoor recreation, public health and safety, visual amenity, and utility.

2—Past preservation of open space lands has primarily been limited to nodal recreation areas such as community, neighborhood and regional parks.

3—Both permanent and semi-permanent open space that are recommended as an addition to the present open space system will require significant commitments of

time, effort and money from the public and private sectors of the overall community.

4—Much of the City's open space which has important natural vegetative and animal species has already been misused by man, thereby emphasizing the importance of preserving remaining natural areas.

5—New methods of funding and implementing the open space system will be required.

6—Open space requirements for the more intensively built-up areas of Sacramento will be the most difficult to meet.

7—Agricultural lands are the largest single source of open space in the City presently, and the most vulnerable to development pressures.

8—Development of a system for the establishment of acquisition and improvement priorities will be critical to the success of the plan.

9—The City's community plans which were developed between 1963 and 1969 require updating, including the open space components thereof, and should reflect significant citizen participation.

OPEN SPACE GOALS

1—To preserve and enhance the inherent natural beauty of the various geographical areas of Sacramento.

2—To prevent the unnecessary or premature conversion of agricultural and other open space lands to urban uses and discourage urban development patterns which are detrimental to the overall community.

3—To protect and conserve important wildlife habitats and open areas of unique ecological significance, particularly along the American River.

4—To preserve open spaces which are required for the protection of man from natural hazards.

5—To provide a permanent park and recreation system of sufficient size and quality to serve the future needs of Sacramento.

6—To provide some category of open space land within reasonable walking distance of each resident.

7—To provide an overall open space system for Sacramento which is inter-connecting to the maximum extent feasible and designed to preserve and enhance the natural and man-made environment.

8—To establish a protective open space buffer on the periphery of public and private facilities having potentially undesirable qualities.

9—To emphasize open space as a design element in each of Sacramento's community plan areas.

10—To take full advantage of all regulatory open space implementation techniques, whenever and wherever the opportunity avails itself.

11—To encourage maximum cooperation between all levels of government and private organizations in the areas of management, conservation and protection of open space resources.

OPEN SPACE GENERAL POLICIES

1—Emphasize open space provisions in the development or renewal of urban-type land uses.

2—Protect open space lands by discouraging the premature or unnecessary extension of public services into them which would facilitate their urbanization.

3—Provide open space areas in Sacramento on the basis of acquisition and improvement priorities. Give programs for acquisition, development or maintenance of open space land in established urban areas at least financial parity with programs for acquisition in less developed areas.

4—Give priority to open space areas which reflect the highest number of open space functions, i.e., managed resource production, resource preservation, outdoor recreation, public health and safety, visual amenity, and utility functions.

5—Provide open space areas in Sacramento by utilizing to the greatest degree possible all available methods and techniques.

6—Encourage preservation of privately-owned open spaces. Such open spaces shall be considered an adjunct to, but not a substitute for, public open space needs.

7—Provide to the maximum extent possible linear connections of open space throughout the City which link major open space lands and highly urbanized areas.

8—Utilize citizen participation in determining open space needs in subsequent refinements of the Open Space Element. These needs should be related to the various community planning areas of Sacramento.

RECOMMENDATIONS

General recommendations

1—As part of the public's continuing involvement in the open space planning process, consideration should be given to the appointment of a citizens advisory committee to review and update the City's present Recreation and Parks Plan and assist at the same time in the process of implementing the recommendations and policies of the Open Space Element.

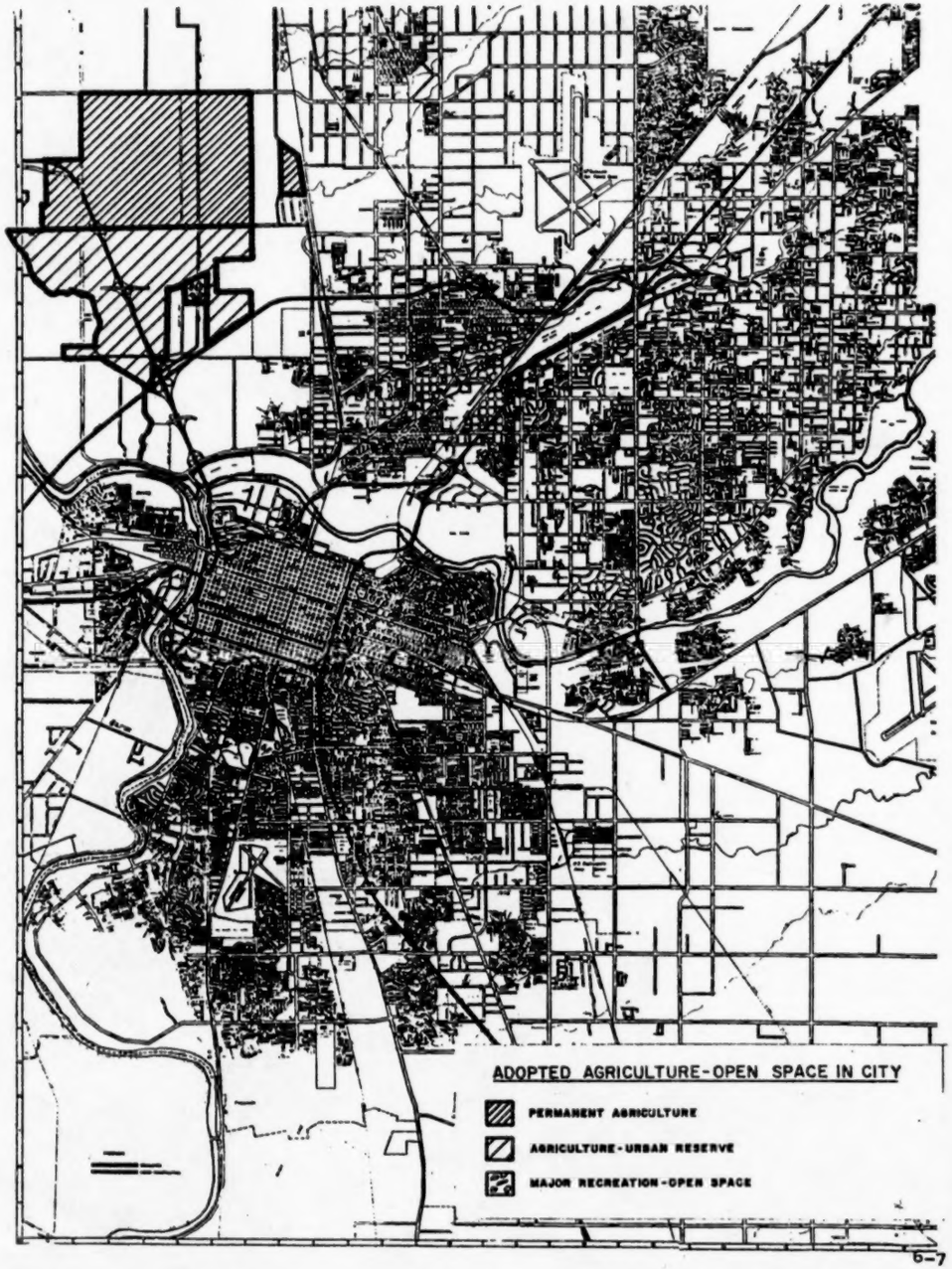
2—As a planning alternative, consideration should be given by the Commission to permitting some highway commercial and industrial land uses in the Natomas area which is recommended for retention as agricultural open space. Such uses could be evaluated on the existence of unique physical and economic conditions which would not induce major ancillary growth in their vicinity. Consideration of this planning alternative could be made following a study by the Planning Department, and in preparation for rezoning lands in the Natomas area from the "A" agriculture zone to the "A-OS" agriculture-open space zone.

Managed resource production

Agricultural areas

1—Reserve the Natomas area north of Interstate 880 (see map on next page) for commercial agriculture by

a—using Williamson Act contracts to preserve these lands in an agricultural land use status,



(THIS PAGE INTENTIONALLY LEFT BLANK)

b—defining development standards, permitted uses and minimum acreage for agricultural areas, and

c—exploring alternative programs which have a positive effect on retaining open space for agriculture purposes.

2—Review City agriculture-urban reserve areas at the time of General Plan updating every 5 to 7 years and adjust these areas if contiguous urban growth warrants the change.

3—Review permanent agriculture areas every 20 years and adjust these areas if warranted.

4—Prohibit the formation of new urban-type assessment districts or the expansion of existing districts inside designated agricultural lands.

Mineral supply areas

1—Designate the Granite Construction Company property (already deeded or under contract to be deeded to the City) as permanent public open space.

2—Explore the feasibility of using unrestored sand and gravel sites for special recreation or other open space type pursuits which generally cause adverse impact upon the urban environment and especially residential areas.

Water supply areas

1—Secure open space use of near-surface aquifer recharge zones where the land can also be used for other open space functions.

Resource preservation

Natural flora and fauna areas

1—Limit the intrusion of man and his activities within natural flora and fauna areas to controlled educational and scientific programs, and to controlled penetration of trails.

2—Encourage the preservation of natural areas designated for the City portion of the American River Parkway and expand the natural area to include the grasslands on the westerly half of Cal Expo property south of the levee, and the Bushy Lake lagoon area.

3—Encourage the preservation of riparian habitats along the Sacramento River, in the vicinity of Beach Lake, along the Natomas East and West Main Drainage Canals, Bannon Slough, Arcade Creek, and in other areas that may warrant preservation at a later time.

4—Develop standards which provide a balance between natural open space and man-made improvements along all drainage ways inside the City.

Man-made areas

1—Use open space wherever practical to complement significant cultural, historical or archaeological features within the overall community.

Outdoor recreation

Nodal and linear recreation areas

1—Emphasize the acquisition and improvement of recreation facilities which link nodal areas such as com-

munity or neighborhood parks with linear areas such as trail systems or greenbelts.

2—Review and update the Recreation and Park Plan for Sacramento . . . . such review should include but not be limited to

a—updating current resources,

b—updating acquisition and improvement priorities, and

c—including citizens from each of the City's planning communities in the process of determining current and future recreation and park needs.

3—Continue using residential development fees for providing both nodal and linear recreation areas.

4—Continue practice of providing outdoor recreation facilities on or adjacent to public schools.

5—Develop standards for providing "mini-parks" as opposed to more conventional neighborhood or community parks in the more highly urbanized sections of the City.

6—Ensure adequate public access to the American and Sacramento Rivers in newly developing areas through continued administration of dedication or in lieu fee provisions of the subdivision ordinance.

7—Study new programs and incentives that promote trail system through subdivisions which are separate from the vehicular circulation system.

8—Continue to develop bikeway systems in the urbanized sections of the City, and study the feasibility of

expanding the system to include connections between major shopping and employment centers and outlying residential areas.

9—Complete the Sacramento River Parkway study as quickly as possible.

10—Work closely with County and regional agencies in developing a comprehensive system of trails both inside and outside the City.

11—Make optimum use of municipal service corridors such as drainage courses and power transmission easements in the City by providing trails for pedestrians, bicycles and equestrians along their length.

12—Continue to study the feasibility of securing an open space-linear greenbelt along the Old Sacramento Northern Railroad right-of-way extending from the northern City limits to the American River.

13—Concurrent with specific planning of linear recreation areas, take appropriate measures to safeguard against problems presently associated with public access to drainageways.

Public health and safety

Potential hazard areas

1—Provide open space for seismic safety inside the City where it is clearly warranted.

2—Continue policies which limit development inside designated flood plain areas of the City.

Pollution buffer areas

1—Provide sufficient open space around the Natomas and Central Sewage Treatment Plants to minimize the

impact of potentially noxious odors on adjacent land uses.

2—Encourage developers of residential subdivisions to use open space as a buffer to highly travelled streets and highways in the City.

Visual amenity

Non-urban areas

1—Continue to evaluate the impact of man and his activities upon the visual amenities offered by such non-urban features as open fields surrounding existing development and flood plain areas of the American and Sacramento Rivers; and take appropriate action to safeguard these amenities.

Urban areas

1—Investigate the feasibility of adopting provisions whereby developers of commercial uses inside the Old City would be permitted "trade-offs" or "credits" in structure and site design which incorporate exceptional open space features.

2—Designate important entrances to urban Sacramento, and initiate a study to upgrade and preserve existing amenities including open space as a possible feature thereof.

3—Continue to seek improvement in the visual appearance of urban-type open space uses including, but not limited to, the use of landscaping as a technique to accomplish this end.

Utility

Municipal service corridors

1—Develop standards for the improvement of power transmission easements and drainageways in the City which reflect a balance between their utilitarian function and their potential linear recreation function or natural resource preservation function.

2—Secure public rights to linear open space wherever possible within existing and future power transmission easements and drainageways.

Transportation corridors

1—Continue to improve the open space aspects of the vehicular circulation system through tree planting and similar landscaping programs.

2—Encourage the use, where feasible, of open space as a design element in conjunction with waiting stations along public transit routes.

3—Urge the State Division of Highways to landscape open spaces within transportation corridors under their jurisdiction as expeditiously as possible following construction activities.

Miscellaneous areas

1—Take necessary action to ensure minimum adverse impact from future privately-owned open spaces which may be used for sanitary landfill operations, and encourage their restoration and retention as permanent open space upon termination of operations where feasible.

2—Recognize cemeteries as providing an important form of open space, and therefore protect them from any unforeseen conversion to other than open space use.

THE OPEN SPACE SYSTEM

Open space has been an important feature of planning activities in Sacramento for many years. The present General Plan provides for a park-open space system which has been continually refined since its adoption in 1965. The Recreation and Park Plan which was formally adopted in 1968 further refines this system, as do each of the City's community plans and general development plans. Various programs implement the recommendations of these plans through a variety of techniques. Until now, however, such plans and programs have concentrated on the recreational aspects of open space.

Consequently, there is a need to expand the concept of open space to include lands and waters which are essentially unimproved and have important functions in addition to their potential recreation value. A comprehensive system of open space, in its multi-functional context, has not been put into a singular document until now. Furthermore, the City recognizes that many aspects of its presently adopted plans and programs which address the subject of open space are incomplete and require new inputs because of changing needs.

Areas proposed for inclusion in Sacramento's open space system are divided into six functional groups. Each group contains specific types of open space, these having been identified as being especially important to the physical environment of this area.

OPEN SPACE FOR MANAGED RESOURCE PRODUCTION

Agricultural lands, mineral supply areas and water supply areas are included in this category.

Agricultural lands play a significant role in Sacramento County's economy and presently constitute the single largest land use inside the City limits with approximately 26.5 square miles or 28.14 percent of the total incorporated area. Crop lands and pastures used for grazing are located generally north and south in the City. Portions of Northgate-Gardenland, Robla, Meadowview and Valley Hi are agricultural as is nearly all of Natomas and South Pocket.

The concern for protection of agricultural lands as open space is well documented locally in both County and regional planning programs. Various individuals and organizations within the City have also expressed a desire to see valuable agricultural lands preserved and not prematurely converted to urban uses, including the Open Space Committee who made recommendations to the Planning Commission to this effect.

Benefits derived from retention of open space land in an agricultural preserve status include the fact that valuable agricultural products can continue to be produced, orderly expansion of urban growth can be realized, and compatible planning objectives in this area of interest can be realized thus furthering cooperation and coordination with County and regional agencies.

Lands that are recommended for retention in the Open Space Plan as an agricultural preserve are located in the Natomas area north of Interstate 880. Of the total 6,934

acres within the City in this area, the 3,582 acres north of Del Paso Road are recommended for a permanent agricultural designation while the approximately 3,172 acres of agricultural land south of Del Paso Road are recommended for an agriculture-urban reserve designation. Lands designated for permanent agriculture are not anticipated, at the present rate of urban growth locally, to be required for urban land uses within the time span of the City's General Plan; while lands designated for agriculture-urban reserve could be needed in part or wholly for contiguous urban growth outward from the City core within the next twenty year period.

If open space for agriculture is to be preserved, there are implementation aspects which must be considered. Refined policies must be developed which deal with accepting contracts under the Williamson Act, exploring other means of implementing State laws relating to property tax relief, and pursuing means for recovering tax revenues lost over the short term through such actions. In addition, permissible development standards in this area must also be thoroughly reviewed.

Mineral supply areas in Sacramento are limited to sand and gravel extractions in the College Green area south and east of Folsom Boulevard and Power Inn Road, and to some dredger operations in the American River downstream of the 16th Street bridge. The City of Sacramento has been deeded a former gravel pit south of Jackson Road between Power Inn and Florin Perkins Roads. This was owned by Granite Construction Company. Gravel pits such as this have very limited potential once their primary operations cease, and their conversion to a form of open

space use will be of value to the Sacramento community at large. Conservation practices for these areas is discussed in more detail in the Conservation Element.

Water supply areas, as it pertains to the Open Space Element, is restricted to consideration of retaining known near-surface aquifer recharge zones in a permanent open space system. This has the primary function of permitting surface waters to percolate through the earth's crust in areas that could otherwise have urban-type impervious covering. Most such recharge areas within the City are linear in distribution and follow, in many cases, existing or former waterways. Man-made improvements have already destroyed their usefulness as natural open space features in the Old City, East Sacramento, College Greens, and Riverside-Land Park areas of Sacramento. Those near-surface aquifer recharge zones that still exist and should remain as essentially unimproved permanent open space are located along Arcade Creek, Magpie Creek, and Dry Creek in North Sacramento; along the Sacramento Drainage Canal south of Reichmuth Park and City portions north of Beach Lake which are associated with that drainage system in South Sacramento River should be retained in a natural state for this same reason.

OPEN SPACE FOR RESOURCE PRESERVATION

Natural flora and fauna areas having unique or representative wildlife features and some man-made areas are in this category.

Few undisturbed wildlife areas are found in Sacramento today. In the past, terrestrial and aquatic areas displaying some of these characteristics were destroyed through

apathy or misuse. It is for these types of open space that specific efforts should be made to secure all rights to the properties and to retain them in a natural state for education and scientific study by man on a controlled basis. Trail systems should be limited to those necessary for observation, through traffic being routed around them wherever possible.

Natural areas that should be retained or improved within the City limits include:

1—Sacramento River lands, especially portions of Chicory Bend that have a unique riparian habitat of trees, shrubs, brush, berry tangles, other plants; and that provide winter cover, summer nesting and migration food supply.

2—American River lands, especially the marshlands at the Cal Expo lagoon, and vegetation of the riparian and woodland habitat along the river's edge.

3—Beach Lake immediately south of the City has some drainage ways that feed into it which offer marshland for natural vegetation and aquatic life.

4—Other waterways offering natural habitat for plants and animals are portions of Fisherman's Slough on the Natomas West Drainage Canal, Bannon Slough in the Northgate-Gardenland area, the Natomas East Main Drainage Canal, and Arcade Creek.

5—Other land areas that are designated by the Recreation and Parks Department to be restored in part to a natural habitat for wildlife include William Chorley Park and Reichmuth Park.

Consideration should also be given in the Open Space System to the preservation of open space as a desirable feature of the historical, cultural, and archaeological resource of the overall community. There may be archaeological sites or valuable artifact sites discovered sometime in the future that could feasibly warrant retention in a permanent open space status. None discovered to date, however, have merited such a status. (The emphasis on providing open space and a means of complementing all urban areas including those of historical, cultural, and archaeological significance is discussed further under the section "Open Space for Visual Amenity.")

OPEN SPACE FOR OUTDOOR RECREATION

Nodal recreation areas such as community, neighborhood and mini-parks, and school playgrounds are included within this open space group; as are linear recreation areas such as trailways, parkway greenbelts, and waterways. These all provide room for a variety of active and passive pursuits. Many passive low intensity recreation pursuits can be accommodated on elongated open spaces within an urban area such as Sacramento. Riding and biking are examples. Other, more active pursuits such as baseball and swimming can be located in any open space, but more commonly in open space having a compact form. All of these recreational open spaces, however, can offer important opportunities for fulfillment of human physical and psychological needs.

A review of the City's park inventory indicates over 1,150 acres of developed land and more than 900 acres of undeveloped or reserve park land.

Roughly half of the developed land is utilized for golf courses. Over 670 acres of the 900 acres in undeveloped land is located on three sites. These lands involve 61 existing parks and 22 proposed parks excluding the Natomas area. In addition, the County and State have several large park areas inside the City.

As a general rule, nodal recreation areas are evenly distributed throughout the urbanized area, but have little interconnection with linear type open spaces that could permit greater accessibility to many areas of high human activity. The Sacramento and American Rivers offer perhaps the greatest opportunity to increase accessibility to the most existing parks.

The Open Space System, as envisioned herein, therefore recommends greater utilization of linear open space recreation areas. Approximately 61.5 miles of creeks, rivers, and drainage canals extend throughout the City alone. An additional 34.5 miles of high power transmission easements also offer potential links in the recreation system as do some of the railroad easements. Some of these miles are limited for this purpose by man-made obstacles such as major thoroughfares. Where these obstacles occur, the local street system may be used. The majority of linkage, however, is believed to be feasible for riding, bicycling and hiking use.

Presently, the City Recreation and Parks Department utilizes a broad variety of funding sources and programs to implement the park system. Federal and State funding sources range from using Legacy of Parks funds to State Bond Act funds. The Neighborhood Development Program

which is sponsored by HUD has recently made it possible to create "mini-parks" in a blighted area of the Old City. All of these tools for implementing the recreation open space system must be re-evaluated, however, in light of continued cutback in funds and program assistance.

Perhaps the most useful tools for realizing the long-term effectuation of the recreation system are the residential development fee which allocates funds from new residential construction to provide for park needs in each of the City's community planning areas, and subdivision requirements which ensure access to lands along the American and Sacramento Rivers.

Implementing the open space system for outdoor recreation is contingent upon three major factors:

1—Updating of the City's Recreation and Park Plan.

2—Developing a plan and specific criteria for acquiring and improving the linear recreation areas to be connected with nodal recreation areas.

3—Encouraging the private sector to provide trail systems for bicycles, pedestrians, and equestrians which are separate from the vehicular circulation system.

OPEN SPACE FOR PUBLIC HEALTH AND SAFETY

Open space in this category is related to potential hazardous areas and pollution buffer areas.

Potential hazardous areas of importance to Sacramento are those subject to flooding. Unstable seismic areas are of questionable significance locally because of their widespread area and the fact that most of the land is already urbanized.

Flood plains of both the American and Sacramento Rivers are left free of most buildings and other forms of man-made improvements that could endanger lives and artifacts. Where such improvements do exist, or are proposed, these must meet rigid requirements of several public agencies including the City.

Pollution buffer areas in Sacramento generally should be provided as protection against excessive noise and offensive odor sources. Provisions for open space around both of the proposed regional sewage treatment plants is essential to the public's health and well-being. The City recently acquired 144 acres of open space north of the proposed Regional Sewage Treatment Plant site. Open space north of the Natomas Sewage Treatment Plant is also recommended. Providing open space along major transportation corridors and adjacent to other offensive odor and noise sources should be explored and implemented where practical.

OPEN SPACE FOR VISUAL AMENITY

Many open spaces have inherent qualities that humans find visually pleasing. The most recognizable of these in the Sacramento area are the rural open fields, the vistas along both the American and Sacramento Rivers, and the urban areas that display extensive landscaping or spacious qualities in some structural forms.

Non-urban forms of visual amenity through securing open space could be accomplished by use of the agricultural preserve designation in the Natomas area and the control of possible visual obstruction within the floodplains of both rivers.

Urban areas can be enhanced through landscaping requirements that are a condition to private development, especially where the use is open by nature, e.g., parking lots. Landscaping requirements are presently imposed by the City in many aspects of private development already, but should be continually re-evaluated and refined. The planned unit development and townhouse zoning provisions have produced visually pleasing open space in Sacramento. These provisions should be continued and further techniques should be investigated. Key entrances to the City should be designated and special consideration given to providing open space where feasible as part of a program to upgrade the City's visual appearance. The Capitol Avenue Bridge approach is a good example of where open space has been effective in enhancing the visual appearance upon entry into Sacramento.

OPEN SPACE FOR UTILITY

Municipal service corridors, transportation corridors and miscellaneous areas such as sanitary landfill sites and cemeteries all have one thing in common: they provide essential services that require a minimum of improvements which obstruct the open space they occupy.

Implied throughout the proposed Open Space System for Sacramento has been the tenant of making multiple use of all open space lands. Drainage ways and power transmission easements have already been recommended as logical open spaces for linear recreation use or natural resource preservation use. Corridors such as streets and freeways and railroads can provide functions in addition to transportation. State landscaping along freeways and

city landscaping along major streets increase the visual amenities of the transportation system. The tree planting program administered by the Recreation and Park Department also enhances street corridors throughout Sacramento. Heavy use of railroad rights-of-way by Southern Pacific and Western Pacific precludes most of these corridors from other type uses associated with the Open Space System. Exceptions are along the old Sacramento Northern and Central California Traction railroads where open space linear greenbelts may be feasible.

Sanitary landfill sites have long-term open space potential. This aspect has already been discussed in the managed resource production section. Cemeteries have open space value in their extensive landscaping, however, these are limited for other open space-oriented uses by cultural and social values.

ACTION PROGRAM

Plans become a reality by developing and augmenting a program for implementation. Identification of a desirable open space system for Sacramento is meaningless unless applicable implementation measures are available and a realistic program of action to effectively use these measures is initiated.

The open space system identified herein demands the use of a broad range of implementation techniques. The best of these depends largely on the type of open space, its location and degree of permanency. Once these implementation techniques are selected, a program for putting them into action can then be developed. Funding is an important part of this aspect. Acquiring new open space lands, making

necessary improvements, and maintaining the public sector of the system requires a formalized funding program. This funding program is usually based on need and a method for reaching assignment of priorities. Regulatory controls, or the non-funding aspect of the action program, are also important and have long been used as a method of shaping urban development, including its open space aspects.

Principal constraints presently confronting implementation of the open space system for Sacramento are:

1—Legal and State legislative limitations which, in the past, have resulted in a minimum of controls on the growth aspects or urban development and a lack of awareness of the importance and vulnerability of the natural environment.

2—Inadequate information as to the feasibility and value of retaining natural systems within an urban environment.

Because of these principal constraints, the plan presented herein is limited to an identification of existing and alternative implementation methods for funding and regulation, and an identification of the key factors which Sacramento could consider in the assignment of priorities for specific open space lands.

Further action, however, is necessary if the policies of this plan are to be implemented. Therefore, the following recommendations are made:

1—Appoint a citizens advisory committee to study and recommend what techniques are best suited to effectuate the adopted open space system. Such a committee should be comprised of a cross-section of local government agencies.

2—Develop a system for assigning priorities for acquisition of open space lands.

3—Incorporate as a component element of the capital improvement program, the recommendations of an open space action program.

Methods of preserving open space. Various methods for preserving open space are currently in use in Sacramento or should be given consideration. These are listed in their estimated order of effectiveness and permanency.

Acquisition in fee: Full fee ownership of land for open space preservation may be acquired by purchase, through gifts, or by the process of eminent domain.

1—Acquisition by public jurisdiction. The City of Sacramento presently uses this preservation method extensively for recreation-parksite acquisition.

2—Purchase-leaseback. Land is purchased by the City and leased back to the original owner or another party for uses compatible to open space objectives under conditions that may be stipulated. Variations could allow, where appropriate, leases for specific lengths of time or in life estate to the original owner.

3—Purchase—sale-back. Land is purchased by the City and resold, however, the open space amenities are retained through restrictions on development rights.

Acquisition of partial interest: Interests that are less than the fee simple in land include easements, leases,

rights-of-entry covenants running with the land, and other "development rights," a term commonly used to indicate a broad range of less-than-fee interests. The purpose of the acquisition of development rights rather than of the entire fee interest are to lower the costs of acquisition, keep the land on the tax rolls and permit land to remain in productive use. Acquisition of partial interest has not been widely used by the City to date, largely because acquisition in fee is more effective as a permanent preservation device particularly in securing park lands.

There are two primary methods of acquiring limited interests in land where police power regulations are inappropriate and full fee ownership not practical or feasible:

1—Williamson Act. California utilizes an open space inducement plan with tax consequences beneficial to the land owners known commonly as the Williamson Act or officially as the Land Conservation Act of 1965. This enabling legislation describes the conditions under which local government can enter into agreements with owners of land, presently in agricultural or other open spaces uses, to form agricultural preserves. The agreements entitle the participants to tax assessments based on present agricultural uses rather than potential urban uses. The County of Sacramento currently uses this method of preserving agricultural lands.

2—Open space and scenic easements, Chapter 6.5 of the Government Code. Any city or county in California which has an adopted general plan may accept grants of open space easements on privately owned lands

lying within their jurisdiction. The jurisdiction under the provisions set forth in this chapter must find that preservation of the land as open space is in the best interest of the (City) and is important to the public for the enjoyment of scenic beauty, for the use of natural resources, for recreation, or for the production of food or fiber.

Other taxing provisions (in addition to the Williamson Act provisions: Section 421 of the Revenue and Taxation Code provides for a specific method of assessing properties that are designated for open space purposes. Under the provisions therein, open space lands are assessed on the basis of their use and not on the valuation of surrounding lands available for other purposes.

Regulatory methods: The City of Sacramento under its "police power" function can control the use that is made of private property. The City uses in varying degrees all of the regulatory methods listed.

1—Zoning. Use and density are controlled through provisions of the Zoning Ordinance. Those used in the past by the City include flood zoning and agricultural zoning classifications, as well as planned unit development and townhouse zoning provisions. An open space zoning ordinance further extends the regulatory method for preserving open space.

2—Subdivision. Generally, subdivisions fronting on navigable waterways are approved only after provisions are made which guarantee reasonable public access easements to and along riverfront areas.

3—Special permit. Uses within a flood zone are sometimes allowed by the City upon issuance of a special permit. This regulatory method is oriented toward open space preservation and is extended to other zones as well.

4—Landscape criteria. Provisions for landscaping public and private developments are used extnesively by the City.

Methods of financing. Since both fee acquisition and less-than-fee acquisition are likely to be quite costly, numerous funding sources should be used.

1—Sale of excess property. The City could place all or a portion of the revenue from the sale of excess property into a special open space purchase and improvement fund.

2—Residential development fee. The City presently uses the residential development fee as a means of purchasing and improving park lands. This method of financing requires all new residential construction to contribute a share towards defraying the costs of recreation and open space facilities resulting from increased population in these residential areas.

3—User fees. Certain types of facilities are operated on a user fee basis. Revenues derived from these fees are used for some improvement costs on golf courses, the zoo and Fairytale Town.

4—Leasing. The City might derive revenue from purchased properties that were leased out to others.

5—Revenue sharing funds. The City is considering the use of revenue sharing funds for capital expenditures

related to open space. This will supplement funds derived from the residential development tax device.

6—Federal, State and City funds. The federal Legacy of Parks Program is presently the source of some monies for the purchase of open space lands and their development within Sacramento. This program further provides grants for up to 75 percent of the cost of acquiring interest in undeveloped or predominantly undeveloped land which has significance in helping to shape economic and desirable patterns of urban growth, including the arrest of urban growth. There are other funds available which can be used for costs relating to open space. The Recreation and Parks Department also uses State Bond Act funds, Land and Water Conservation funds, and others. Monies derived from the HUD Neighborhood Development Program have been utilized locally to finance park and open space purchases and improvements. Competition for grants has increased, however, and should not be counted on to implement the open space program. The City should also give consideration to local bond issues as a potential funding device.

7—Private Funds. Private citizens and groups have set up non-profit land banks, or trusts, which are being used in various parts of this country to preserve open space in perpetuity without the chance of sale or misuse. The City has received bequests of land or monies for open space in the past, however, it should develop a more formalized program to encourage gifts and/or financial trusts for this purpose.

Determination of open space priorities. Development of a system for assigning priorities for acquisition and improvement of open space lands should include, but not necessarily be limited to the following criteria:

1—Public safety. The protection of the public from natural hazards.

2—Low-income and minority groups. The needs of low-income and minority group neighborhoods are of particular concern to Sacramento in as much as these areas generally lack open space amenities.

3—Managed resource production. The economy of the Sacramento region is dependent on the continuing production of managed resources.

4—Recreation. One of the essential uses of open space is for the provision of outdoor recreation opportunities.

5—Accessibility. Increasing the accessibility of open spaces through linking devices such as linear open space-greenbelts provides continuity to the total open space system.

6—Timing. The timing of acquisition or improvement of a given open space is often a factor which directly influences its feasibility.

7—Multiple use. Multi-functional open space is a means of efficient management of land.

8—Natural resources. The intrinsic value of natural resources is irreplaceable and their preservation is essential.

9—Urban development. Open space as a determinant in shaping the urban form is an important consideration.

10—Environmental enhancement. Open space uses can serve as a method of adding economic value to adjacent properties by creating a more desirable environment.

11—Visual amenities. Certain open spaces in Sacramento offer unique and irreplaceable scenic vistas.

12—Population served. The number of people benefiting from a given open space is important in determining priority for acquisition and improvement of such open space.

APPENDIX D

Sacramento City Ordinance No. 3283—Fourth Series

Ordinance No. 3283, Fourth Series

An Ordinance Amending Ordinance No. 2550, Fourth Series, Adding Provisions Relating to Open Space, Creating Open Space Zones, and Amending Certain Other Sections.

Be It Enacted By The Council Of The City Of Sacramento:

Section 1:

Ordinance No. 2550, Fourth Series, the Comprehensive Zoning Ordinance of the City of Sacramento (hereinafter referred to as "Ordinance") is hereby amended by adding Subparagraph 4 to Subsection B of Section 1 to read as follows:

4. Ensure the provision of adequate open space for aesthetic and environmental amenities.

Section 2:

Subparagraph 3 of Subsection C of Section 1 of said Ordinance is amended to read as follows:

3. Provide adequate open space for aesthetic and environmental amenities.

Certified as true copy of Ordinance No. 3283 4th Series
Dated certified Oct. 1, 1979

_____
Deputy City Clerk, City of Sacramento

Section 3:

Subsection D of Section 1 of said Ordinance is hereby amended by changing the definition of two zones and by adding the definition of a new zone as follows:

Agricultural Zone — A: This is an agricultural zone restricting the use of land primarily to agriculture and farming. It is also considered an open space zone. Property in this zone will be considered for reclassification when proposed for urban development which is consistent with the General Plan.

Flood Zone — F: This is a special zone which permits agricultural uses and other uses subject to special review and approval. It is also considered an open space zone. It is intended to be applied to areas along the Sacramento and American Rivers and their tributaries, and other areas subject to inundation.

Agriculture-Open Space — A-OS: This is an exclusive agricultural zone designed for the long term preservation of agricultural and open space land. This zone is designated to prevent the premature development of land in this category to urban uses.

Section 4:

Subparagraph 3 of Subsection B and Subparagraph 2 of Subsection C, both of Section 2 of said Ordinance, are hereby amended, said amendments to be set forth in the same form as shown in the existing chart in said Ordinance:

A new zone entitled "A-OS Agriculture-Open Space Zone" is added to Subsection B of Section 2 of this

Ordinance and the following uses shall be permitted in said zone:

SUBJECT TO THE PROVISIONS OF THE FOLLOWING SUBPARAGRAPHS OF SUBSECTION E OF SECTION 2 OF SAID ORDINANCE

Uses	
3. Single Family Dwelling	Not Subject

A new zone entitled "A-OS Agriculture - Open Space" is hereby added to Subsection C of Section 2 of this Ordinance and the following uses shall be permitted in said zone:

SUBJECT TO THE PROVISIONS OF THE FOLLOWING SUBPARAGRAPHS OF SUBSECTION E OF SECTION 2 OF SAID ORDINANCE

Uses	
2. Agricutural Uses, General	Not Subject

SECTION 5:

Subparagraph 17 of Subsection B of Section 3 of said Ordinance is hereby amended to read as follows:

MAXIMUM HEIGHT:	50 Feet
INTERIOR SIDE YARD:	10 Feet
MINIMUM LOT AREA:	5 Acres

SECTION 6:

Subparagraph 19 of Subsection B of Section 3 providing for the height and area regulations of the "A-OS Agricul-

tural—Open Space Zone" is hereby added to said Ordinance, said regulations to read as follows:

19

ZONE:	A-OS
LOCATION:	All
MAXIMUM HEIGHT:	50 Feet
MINIMUM YARD REQUIREMENTS:	
Front:	50 Feet
Rear:	50 Feet
Side:	25 Feet
Street Side:	50 Feet
MAXIMUM LOT COVERAGE:	NO REQUIREMENT
MINIMUM LOT AREA PER DWELLING UNIT:	20 ACRES

SECTION 7:

Subparagraph 8 of Subsection C of Section 3 of said Ordinance is hereby repealed.

SECTION 8:

Subparagraph 1 of Subsection D of Section 3 of said Ordinance is hereby amended to read as follows:

1. Preliminary and final site plans of a proposed development shall be submitted to the Planning Commission for review and approval in all cases in the OB, SC, HC, RO and F zones, and when C3 zoned property is used in whole or part for residential purposes.

SECTION 9.

Subparagraph 4 of Subsection A of Section 14 of said Ordinance is hereby amended as follows:

4. Not adverse to General Plan: A variation must be in harmony with the general purpose and intent of the Zoning Ordinance. It must not adversely affect the General Plan or specific plans of the City, or the Open Space Zoning regulations.

SECTION 10:

Subparagraph 16a and 34a of Subsection A of Section 22 are hereby added to said Ordinance to read as follows:

16a. Improvements: Buildings, structures and fixtures erected on or affixed to land except telephone, telegraph and electrical lines.

34a. Open Space: Land and water essentially without improvements and used for public recreation, enjoyment of scenic beauty, conservation or use of natural resources, production of food and fibre, light and air or environmental amenity.

SECTION 11:

Section 23 is hereby added to said Ordinance to read as follows:

Section 23: OPEN SPACE

A. Purposes: The purpose of these Open Space regulations is:

1. To protect the public health, safety and welfare.
2. To contain and structure urban development.
3. To protect and preserve undeveloped land as a limited and valuable resource.
4. To provide for:
   a. Managed resource production and preservation.
   b. Outdoor recreation.
   c. Public health and safety.
   d. Visual amenity.

B. Open Space Zones: The following are adopted as open space zones:

1. "A-OS" Agriculture-Open Space
2. "A" Agriculture
3. "F" Flood
4. All other zones to the extent that the developments therein provide for open space as a required or integral design component, such as public facilities (schools, parks) and private facilities (recreation areas, planned unit developments, townhouse projects, mineral extraction areas).

C. Special Permits: Notwithstanding Subsection F of Section 2, only the following special uses may be located in the following open space zones, subject to the granting of a special permit by the Planning Commission:

1. "A-OS" Agriculture-Open Space and "A" Agriculture.
   a. Accessory dwellings for persons employed for agricultural purposes on the subject property.
   b. Animal kennels and hospitals.
   c. Animal or poultry slaughtering or processing facilities.
   d. Outdoor amusement enterprises.
   e. Livestock feed or sales yards.
   f. Stands for sale of agricultural products.
   g. Mineral extraction operations.
   h. Riding stables.
   i. Golf courses or driving ranges.
   j. Public utilities or facilities.

2. "F" Flood
   a. Private boat docks.
   b. Marinas.
   c. Outdoor amusement enterprises.
   d. Outdoor recreation facilities.
   e. Golf course or driving ranges.
   f. Mineral extraction operations.
   g. Public utility transmission facilities.

No special permit shall be issued hereunder unless the Planning Commission first determines that such issuance would be in conformity with the Zoning Ordinance and the General Plan as they relate to open space.

D. Variances: Open space regulations are to be literally and strictly interpreted and enforced to protect the public interest in the preservation and conservation of open space lands and their amenities and the orderly urban development of such lands as required; hence, variances will be granted only in extreme circumstances.

Passed: June 7, 1973

Effective: July 7, 1973

/s/
Mayor

Attest:

/s/
City Clerk

APPENDIX E

In accord with the *Eldridge* decision is that of *Pinheiro v. County of Marin, supra,* which held that in order to state a cause of action in inverse condemnation, the Plaintiff must allege (1) precondemnation activities *or* (2) the lack of any remaining reasonably beneficial use of the property *or* (3) that the subject property has been put to a public use. (*Pinheiro, supra* at 328).

The underlying rationale and thread that ties the inverse condemnation cases together is the constitutional principle espoused by the California Supreme Court in *Holtz v. Superior Court*, 3 Cal.3d 296, 303:

> "The relevant 'policy' basis of Article I, Section 14 [now Section 19] was succinctly defined in *Clement v. State Reclamation Board* [1950], 35 Cal.2d 628, 642 [220 P.2d 897]: 'The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.' *In other words, the underlying purpose of our constitutional provision in inverse—as well as ordinary—condemnation is 'to distribute throughout the community the loss inflicted upon the individual by the making of a public improvement.*" (*Bacich v. Board of Control* [1943], 23 Cal.2d 343, 350 [144 P.2d 818]): . . . (Emphasis in original)

Considering a problem such as the one at bench, the United States Supreme Court in *Penna. Coal Company v. Mahon,* 260 U.S. 393, concluded:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in

danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions." (At 415-416)

Recent Federal cases have followed the same line of rationale. In *Arastra, Ltd. Partnership v. City of Palo Alto,* 401 F.Supp. 962 and *Dahl v. City of Palo Alto,* 372 F.Supp. 647, the Courts held that where there was undue restriction of property, a claim in inverse condemnation may be appear to be statutory authority for the taking of an open 401 F.Supp. 354)

Nor as pointed out in *Eldridge, supra,* at 625, does there appear to be statutory authority for the taking of an open space easement under the police power without just compensation. In fact, the *Eldridge* Court noted:

> "We do note, however, what appears to be legislative recognition that, at least ordinarily, such public benefit should be obtained by purchase or by eminent domain. Government Code, Section 51073 states: 'The Legislature . . . declares that the acquisition of open-space easements is in the public interests and constitutes a public purpose for which public funds may be expended or advanced."

This rationale is given further credence by the enactment of *Government Code,* Section 65912 which provides as follows:

> "The Legislature hereby finds and declares that this article is not intended, and shall not be construed, as

> authorizing the city or the county to exercise its power to adopt, amend or repeal an open space zoning ordinance in a manner which will take or damage private property for public use without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or of the United States."

In the case at bench, Appellants have alleged that they have been denied substantially all economic or beneficial use of the subject property as a result of the land use regulation in question. Set forth below is a summary of the allegations which support this statement:

1. By limiting the subject property to agricultural use, Respondents have effectively and directly eliminated any and all possible benefits or values manifest by the trunk sewer lines and the same are now without use, benefit, or value of any

* * * *

imposed by Respondent have effectively deprived Appellants of any reasonable or beneficial use of their land.

It should be pointed out at this time that the Complaint in question was filed on February 27, 1975, prior to *Eldridge* (1976) and *Pinheiro* (1976). These two cases set forth the "magic words" which must be alleged in order to state a cause of action in inverse condemnation, to wit: "Denial of any reasonable or beneficial economic use" of the subject property. As it was pointed out by this Court in *Flournoy v. State of California,* 230 Cal.App.2d 520, where the law changes from the time the original Complaint was filed until the time the matter is heard on de-

murrer, the Courts must be extremely liberal in allowing the plaintiff to amend the Complaint so as to comply with the changing law. (*Flournoy, supra,* at 537-538) This is especially true where "counsel for plaintiffs assured [the] Court during oral argument that plaintiff expects to prove that . . . " he is able to state a cause of action. (*Flournoy, supra,* at 537) Counsel for Appellants assured the lower Court that the Complaint could be amended so as to comply with the new language in *Eldridge* and *Pinheiro* as to the cause of action for inverse condemnation. This author further assures this Court that should this Complaint be deemed inadequate that it can be amended to state a cause of action. (See Appendix A)

V. THE EXACTION FROM A PROPERTY OWNER OF THE COST OF A PUBLIC IMPROVEMENT IN SUBSTANTIAL EXCESS OF THE SPECIAL BENEFITS ACCRUING TO HIM IS, TO THE EXTENT OF SUCH EXCESS, A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION.

As indicated above, Respondents felt it necessary to install the sewer lines under Appellants' property so as to allow existing subdivisions on one side of Appellants' property to hook up to a sewage treatment plant on the opposte side of Appellants' property. Thus, it was necessary to run sewer lines beneath Appellants' property. Appellants consented, or at least did not oppose such action, based upon the representation that they would be able to develop their property and use the sewer lines at a later date. Accordingly, Appellants were assessed $378,609.00 for the sewer lines. However, due to the land use restrictions im-

posed, Appellants were and still are unable to use the sewer lines since they may not further develop their property. The United States Supreme Court has held:

> "In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess,* a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact quality of taxation is not always attainable, and for that reason the excess of the cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." (*Norwood v. Baker,* 172 U.S. 269, 279) (Emphasis in original)

Appellants respectfully contend that where a property owner has been assessed $378,609.00 and paid over $300,000.00 (including interest), for sewer lines which they are prohibited from using that the cost of public improvement is in *substantial excess* of the special benefits accruing to the property owner. The *Norwood* doctrine has been reaffirmed by the United States Supreme Court on numerous occasions. (See: *Myles Salt Company v. Iberia Drainage District,* 239 U.S. 478; *Gast Realty v. Schneider Granite Company,* 240 U.S. 55; *Georgia Railway and Electric Company v. Decatur,* 295 U.S. 165) Indeed, the right of private property as guaranteed by the Constitution would be seriously impaired if it were established that the imposition by the Legislature upon particular private property of the substantial cost of public improvements, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in a

Court of law or equity. Appellants respectfully submit that this is exactly what is happening in the case at bench.

It is equally clear that under the California State Constitution, assessments for special improvements may only be made where the assessed property receives a special benefit that corresponds with the assessment. (See: *Spring Street Company v. City of Los Angeles,* 170 Cal. 24, 30; *Harrison v. Board of Supervisors,* 44 Cal.App.3d 852, 856-857, and authorities cited therein)

VI. WHERE A GOVERNMENTAL ENTITY "FREEZES" DEVELOPMENT OF ANY MEANINGFUL KIND THEREBY DENYING THE PROPERTY OWNER ANY PRACTICAL OR BENEFICIAL USE OF THE SUBJECT PROPERTY, A CAUSE OF ACTION FOR INVERSE CONDEMNATION IS STATED.

In *Peacock v. County of Sacramento,* 271 Cal.App.2d 852 this Court held that where the impact of a land use regulation . . "was to 'freeze' development of any meaningful kind . . . and such action by the county's representatives was confirmed and ratified by 'policy decisions' of the Board of Supervisors in rejecting plaintiffs' plans for subdivision development in that part of their land in which under the terms of the ordinance itself building construction would have been permitted to a height substantially above 'zero' or 'ground level', a cause of action for inverse condemnation may be stated." (*Peacock, supra,* at 862)

The underlying rationale of the *Peacock* case appears to be that when a governmental entity "freezes" development of

• • • •

APPENDIX F

CERTIFIED FOR PUBLICATION

COPY

In the Court of Appeal
of the
State of California
In and For
The Third Appellate District
(Sacramento)

[Filed October 12, 1978]

Lawrence E. Furey, Trustee, Plaintiff and Appellant, vs. City of Sacramento, a Chartered City, County of Sacramento, Natomas Sanitation District of Sacramento County, and the Sacramento Regional County Sanitation District, Defendants and Respondents.	3 Civil 16516 (Super.Ct.No. 252325)
Ernest E. Webber, Nellys F. Webber and Robert A. Waller, Plaintiffs and Appellants, vs. City of Sacramento, Sacramento City Council, Sacramento City Planning Commission, County of Sacramento, Sacramento County Board of Supervisors, and Natomas Sewer Assessment District, Defendants and Respondents.	3 Civil 16626 (Super.Ct.No. 249487)

• • • •

OPINION ON REHEARING

These two cases raise substantially identical questions; accordingly we have consolidated them for hearing and disposition. In both, the trial court sustained demurrers to complaints for inverse condemnation damages, without leave to amend; plaintiffs appealed from later judgments of dismissal.

Lawrence Furey and his predecessor Joseph A. Maun, trustees, have owned 1,157 acres (the Furey property) in the Natomas area of Sacramento County (County) since 1960.[1] Ernest and Nellys Webber and Robert Waller (hereinafter collectively the Webbers) have owned 363 acres (the Webber property) in the same area for the same period of time. Between 1961 and 1965, the County laid large trunk sewer lines throughout the Natomas area, and built a sewage treatment plant. Property served by the trunk lines was assessed a total of $3,137,462.86 for the sewer facilities; $840,664.72 of this was against the Furey property and $378,609 against the Webber property. Financing was by bonds under the Improvement Act of 1911. (Sts. & Hy. Code, § 5000 et seq.) The sewer lines and treatment plant are currently operational.

The Natomas area was annexed to the City of Sacramento (City) on October 7, 1961. The sewer trunk lines and the treatment plant were designed to provide adequate sewage disposal for the planned future residential and commercial growth of the area in accordance with the Natomas General Development Plan adopted by the City on December 6, 1962. Between 1961 and 1965, the City and

[1]Our recitation of facts is taken from allegations contained in a first amended complaint in each action.

County variously adopted other plans and entered into other agreements specifying that the Natomas area generally was subject to residential and commercial development. Among these plans and contracts were a 1962 Sacramento Metropolitan Airport Plan, various freeway agreements, a community plan for Northgate Gardenland, and a community plan for Old City. Despite the completion of the sewer facilities and the existence of these general plans, plaintiffs' properties remained, and still remain, zoned agricultural.[2]

In 1970, the California Legislature enacted legislation to preserve open-space land. (Gov. Code, § 65560 et seq.) As amended, Government Code section 65563 required every city and county, no later than December 31, 1973, to adopt an open-space plan "for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiction." The Legislature found the preservation of open-space necessary for the "continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources." (Gov. Code, § 65561, subd. (a).) It placed particular emphasis upon the public interest in "discouraging premature and unnecessary conversion of open-space land to urban uses . . . because it will discourage noncontiguous development patterns which unnecessarily increase the costs of community services to community residents." (Gov. Code, § 65561, subd. (b).)

[2]The Webbers allege that they developed a trailer park on a portion of their land, apparently in 1970. Since this use is inconsistent with agricultural zoning, we assume that this portion of land was not affected by the City's subsequent Open Space Ordinance and is therefore not included in this litigation.

In accordance with state requirements, the City Planning Commission drafted an "Open Space Element" for the City's General Plan. That document stated in part:

> "Lands that are recommended for retention in the Open Space Plan as an agricultural preserve are located in the Natomas area north of Interstate 880. Of the total 6,934 acres within the City in this area, the 3,582 acres north of Del Paso Road are recommended for a permanent agricultural designation while the approximately 3,172 acres of agricultural land south of Del Paso Road are recommended for an agriculture-urban reserve designation. Lands designated for permanent agriculture are not anticipated at the present rate of urban growth locally, to be required for urban land uses within the time span of the City's General Plan; while lands designated for agriculture-urban reserves could be needed in part or wholly for contiguous urban growth outward from the City core within the next twenty year period."

The Open Space Element also contained recommendations to "[r]eview City agriculture-urban reserve areas at the time of General Plan updating every 5 to 7 years and adjust these areas if contiguous urban growth warrants the change" and to "[r]eview permanent agriculture areas every 20 years and adjust these areas if warranted."

Four-fifths of the Furey property is within the "permanent agriculture" area, and one-fifth within the "agriculture-urban reserve" area. The Webber property is all within the "agriculture-urban reserve" area.

The Open Space Element was adopted by the city council on June 7, 1973. On the same date the city council enacted an Open Space Ordinance, amending its Comprehensive Zoning Ordinance, to define certain zones as follows:

> "Agricultural Zone—A: This is an agricultural zone restricting the use of land primarily to agriculture and farming. It is also considered an open space zone. Property in this zone will be considered for reclassification when proposed for urban development which is consistent with the General Plan.
>
> ". . .
>
> "Agricultural-Open Space—A-OS: This is an exclusive agricultural zone designed for the long term preservation of agricultural and open space land. This zone is designated to prevent the premature development of land in this category to urban uses."

The ordinance further provided that:

> ". . . only the following special uses may be located in the following open space zones, subject to the granting of a special permit by the Planning Commission:
>
> "1. 'A-OS' Agriculture-Open Space and 'A' Agriculture.
>
> "a. Accessory dwellings for persons employed for argicultural purposes on the subject property.
>
> "b. Animal kennels and hospitals.
>
> "c. Animal or poultry slaughtering or processing facilities.
>
> "d. Outdoor amusement enterprises.
>
> "e. Livestock feed or sales yards.
>
> "f. Stands for sale of agricultural products.
>
> "g. Mineral extraction operations.
>
> "h. Riding stables.
>
> "i. Golf courses or driving ranges.
>
> "j. Public utilities or facilities."

Of significant importance, the ordinance added:

"No special permit shall be issued hereunder unless the Planning Commission first determines that such issuance would be in conformity with the Zoning Ordinance *and the General Plan* as they relate to open space.

"D. Variances: Open Space regulations are to be literally and strictly interpreted and enforced to protect the public interest in the preservation and conservation of open space lands and their amenities and the orderly urban development of such lands as required; hence, variances will be granted only in extreme circumstances." (Emphasis added.)

Thus, although neither the Open Space Ordinance nor the Open Space Element of the General Plan specifically *zoned* plaintiffs' property as open space, the effect of the Ordinance was to prevent legislatively any change from its agricultural zoning or any special use inconsistent with the open-space designation in the General Plan for the five to seven and twenty-year periods respectively specified in the Open Space Element.

On October 30 and on November 30, 1973, the Webbers attempted to file with the City Planning Commission a tentative subdivision map, an application to rezone, and an application to amend the General Plan to allow urban uses on the property. The planning commission refused to accept any of them except the application to amend. From November 1973 through June 1974 (when their complaint was filed), the Webbers unsuccessfully sought a hearing from the planning commission and the city council. They allege, and defendants do not contend otherwise, that they have exhausted their administrative remedies. Furey does

not allege that he made any attempt to have the ordinance or zoning changed prior to filing his complaint.

Both Furey and the Webbers allege that the Open Space Element of the General Plan, coupled with the Open Space Ordinance, resulted in an inverse condemnation of their property, including the sewer facilities. Alternatively they assert that defendants' prior activities, including the 1962 Natomas General Development Plan and particularly the installation of the sewer facilities, estopped the City from designating plaintiffs' property as open space. In addition to the City, they named as defendants the County, the Natomas Sanitation District (which has since been succeeded by the Sacramento Regional County Sanitation District), and others hereinafter specified.

I

EXHAUSTION OF ADMINISTRATIVE REMEDIES

We dispose of a preliminary issue. As already indicated, the adoption of the Open Space Element by the city council, along with a strongly-worded zoning ordinance, essentially foreclosed any administrative discretion to permit uses of plaintiffs' property for anything other than agricultural open space. Any doubts on this score were laid to rest by the Webbers' unsuccessful efforts to obtain administrative relief. We are also satisfied that there was no administrative remedies for Furey to exhaust prior to his complaint.

II

ESTOPPEL

We reject the contention that the City is estopped from designating plaintiffs' property as A and A-OS.

In Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal.3d 785, the Supreme Court considered a similar contention. In 1972, Avco had obtained a rough grading permit and county approval of a final map dividing its property into 27 parcels devoted largely to multiple residential uses. Further expenditures were explained thus:

> "Avco undertook a number of studies for the development of the tract, and proceeded to subdivide and grade the property. By February 1, 1973, pursuant to approvals issued for such purposes by the county, Avco had completed or was in the process of constructing storm drains, culverts, street improvements, utilities, and similar facilities for the tract as well as for the remainder of the Capron property. Under the county's building code, a permit could not be obtained until grading had been completed. Avco had not completed the rough grading by February 1, 1973, and it neither submitted building plans for the tract nor obtained a permit to construct any structures. Before that date, the company had spent $2,082,070 and incurred liabilities of $740,468 for the development of the tract; it is losing $7,113.46 a day, largely due to loss of anticipated rental value, as a result of its inability to proceed with construction of buildings on the tract." (*Id.* at pp. 789-790.)

On February 1, 1973, the California Coastal Zone Conservation Act became effective, requiring a permit from the California Coastal Zone Commission to develop any property within the coastal zone. Avco contended that its improvements on the property prior to February 1, 1973, gave it a vested right to proceed with its development without such a permit. The Supreme Court rejected the

contention on the ground that Avco had never obtained a building permit from the county, then turned to the question of estoppel:

> "Avco asserts that even if it does not have a vested right to build without a permit from the commission, it must nevertheless be allowed to proceed with construction because the commission is estopped to enforce the requirements of the Act. This claim is founded upon the so-called 'Beach Agreement' entered into between the Orange County Harbor District and Avco, and approved by the state. Under this agreement, Avco consented to sell the county 11 acres of sandy beach at a price substantially below fair market value and an additional 23 acres for parking at fair market value, and to dedicate certain land for access purposes. The district was to use the property for a public park. The sale was conditioned upon the issuance of certain approvals by the county[9] [fn. 9 provides: "For example, the county was required to approve planned community zoning, and to issue a grading permit"], the enactment of a bill by the Legislature releasing any public rights in the property, and confirmation of the agreement by the State Lands Commission. The approvals were granted, and the bill was passed.
>
> "Both the Beach Agreement and the bill recite that there is a disagreement between the county and Avco with respect to whether the public had acquired prescriptive rights in some of the land purchased by the county, and that the sale is intended to resolve these differences without litigation. Avco asserts that it agreed to sell the property to the Orange County Harbor District in exchange for a commitment by the county and the state that it would be permitted to develop tract 7479 in accordance with the planned community zoning, the regulations and the tract map, that

it expended large sums of money in reliance on this promise and that the commission is estopped to apply the requirements of the Act to the development. Predictably, the commission counters this assertion by claiming that the Beach Agreement represented the resolution of a dispute over public prescriptive rights in the land conveyed and has no reference to development of any remaining property.

"The trial court declined to decide whether the commission had violated the Beach Agreement because the court concluded that the state's police power overrides any obligation of the state to perform the Beach Agreement, and that the commission was not estopped to require Avco to obtain a permit under the Act.

"We agree with this aspect of the trial court's conclusion. Land use regulations, such as the Act, involve the exercise of the state's police power (*Miller* v. *Board of Public Works, supra,* 195 Cal. 477, 486-489), and it is settled that the government may not contract away its right to exercise the police power in the future. (*Caminetti* v. *Pac. Mutual L. Ins. Co.* (1943) 22 Cal.2d 344, 362 [139 P.2d 908]; *Laurel Hill Cemetery* v. *City and County* (1907) 152 Cal. 464, 475 [93 P. 70]; *Maguire* v. *Reardon* (1916) 41 Cal.App. 596, 601-602 [183 P. 303].) *Thus, even upon the dubious assumption that the Beach Agreement constituted a promise by the government that zoning laws thereafter enacted would not be applicable to tract 7479, the agreement would be invalid and unenforceable as contrary to public policy.*" (*Avco, supra,* 17 Cal.3d at pp. 799-800.) (Emphasis added.)

The import of *Avco* is that public policy requires that legislative bodies have maximum freedom to change their minds; absent a "vested right," a legislative body cannot,

either by express agreement, or by estoppel, bind itself to future action or forebearance.

This court recently reaffirmed the *Avco* principle in *Raley* v. *California Tahoe Regional Planning Agency* (1977) 68 Cal.App.3d 965. ". . . Raley spent $150,000 in reliance upon a land-use permit lawfully granted by a state instrumentality which was then repudiated by a related state instrumentality. The two agencies had overlapping membership and occupied a relationship of mutual awareness and privity." (*Id.* at p. 984.) We held that the California Tahoe Regional Planning Agency was "not vulnerable" to an estoppel. (*Id.* at p. 976.) We pointed out that the "vested right" doctrine is a species of estoppel, and even considered whether the agency might be estopped "independently of the builder's acquisition of a vested right" (expressly stating that we did so "without investigating the assumption" that such estoppel was possible). (*Id.* at p. 978.) In our conclusion, we conceded that "[i]n the evolutionary dynamics of California environmental law, the plasticity of equitable estoppel has been replaced by the rigidity of the vested rights rule. Doctrinal evolution has come full circle—from the formal, unmoral rigidities of medieval common law to the individualized humanity of equity and back again to the fixed demands of the vested rights rule." (*Id.* at p. 985.)

In *Avco,* only estoppels which rise to the level of "vested rights" can be judicially recognized in zoning and permit cases. Although as pointed out in *Raley,* "[s]everal decisions intimate that a building permit may no longer be the *sine qua non* of a vested right if preliminary public

permits are sufficiently definitive and manifest all final discretionary approvals required for completion of specific buildings," (*id.* at p. 975, fn. 5), plaintiffs here obtained no permits or approvals whatever. Their claim based upon the sewer assessments and prior general planning documents is substantially short of the required showing.

III

INVERSE CONDEMNATION

Plaintiffs argue alternatively that the open-space regulations constitute a taking or damaging of private property for public use, for which they are entitled to compensation under article I, section 19 of the California Constitution. We agree, with limitations.

A

To put our conclusion into perspective, we briefly discuss the facts alleged by plaintiffs which do *not* constitute inverse condemnation. Contrary to Furey's contentions, the following allegations in his complaint are not sufficient to state a cause of action:

". . . said property was at all times mentioned herein and still is at the present time used solely for agricultural purposes at great financial loss to plaintiff.

". . . .

"Plaintiff has not and cannot maintain and operate his aforementioned property so as to obtain a reasonable economic return on his investment so long as said property is restricted to agricultural uses. The only beneficial and

reasonable use of plaintiff's property is for residential and commercial uses.

". . . .

"Said enactments prohibit any and all beneficial and reasonable uses of plaintiff's property; . . ."

Equally insufficient are the Webbers' allegations that their "property has been rendered unusable for any private purposes and made completely valueless for any private use not conforming with Open Space Element of the General Plan, and plaintiffs have been further required to hold said property solely for the use and benefit of the public uses described in the open space of the General Plan," and that they ". . . have been unable to derive value, rents, reevnues or profits commensurate with their investment in the subject property and the public improvements thereto for other than agricultural uses . . . ."

It is clear from such allegations that the properties are presently being used for agricultural purposes, a use permitted by the Open Space Ordinance. We take judicial notice that such use is substantial. (Evid. Code, § 452, subd. (g).) Accordingly, under the well-settled law most recently summarized by the Supreme Court in *HFH, Ltd.* v. *Superior Court* (1975) 15 Cal.3d 508, there has been no taking.

In *HFH,* plaintiffs contracted to purchase agriculturally zoned property upon condition that the seller obtain commercial zoning. The seller did so, and the sale was consummated. The City of Cerritos subsequently approved a parcel map subdividing the property in a manner appropriate for commercial uses. Five years elapsed without

development, and in 1961 the city placed a moratorium on more intensive uses of the property by temporarily zoning it agricultural. In 1972, despite plaintiffs' requests to restore the commercial zoning, and despite the fact that land on other corners of a roadway intersection on which plaintiffs' land abutted was commercially zoned, the city rezoned it to single family residential. (*Id.* at pp. 511-512.) The Supreme Court noted:

> "Plaintiffs allege that the situation of their properties rendered them 'useless' for single family residential purposes; they do not, however, allege that the properties are useless for *other* purposes consonant with the zoning category in which they now lie. As a consequence, according to plaintiffs, their land, which they purchased for some $388,000 and hoped to sell for $400,000, suffered a decline in market value to $75,000." (*Id.* at p. 512, fn. omitted.)

The Supreme Court added:

> "Plaintiffs also complain of the deprivation 'of any reasonably beneficial use of . . . said properties commensurate with its value.' In the same section of their complaints, however, they allege a remaining fair market value of $75,000. The substantial value of their land rebuts the allegation that they cannot enjoy any reasonably beneficial use of it." (*Id.* at p. 512, fn. 2.)

In upholding the trial court (which sustained a demurrer to the complaint), the Supreme Court quoted with approval from the holding in *Morse* v. *County of San Luis Obispo* (1967) 247 Cal.App.2d 600:

> "'Plaintiffs are apparently attempting to recover profits they might have earned if they had been successful in getting their land rezoned to permit sub-

> division into small residential lots, but *landowners have no vested right in existing or anticipated zoning ordinances.* (*Anderson v. City Council* [1964] 229 Cal.App. 2d 79, 88-90 [40 Cal.Rptr. 41].) A purchaser of land merely acquires a right to continue a *use* instituted before the enactment of a more restrictive zoning. Public entities are not bound to reimburse individuals for losses due to changes in zoning, for within the limits of the police power "some uncompensated hardships must be borne by individuals as the price of living in a modern enlightened and progressive community." (*Metro Realty* v. *County of El Dorado* [1963] 222 Cal.App.2d 508. . . .)' (247 Cal.App.2d at pp. 602-603; italics added.)" (*Id.* at p. 516, fn. omitted.)

The *HFH* court expressly stated that it did not decide the question of entitlement to compensation "in the event a zoning regulation forbade substantially *all* use of the land in question." (*HFH, supra,* 15 Cal.3d at p. 518, fn. 16.) (Emphasis in original.) But as noted, plaintiffs here, as in *HFH,* are able to make substantial use of their property.

Brown v. *City of Fremont* (1977) 75 Cal.App.3d 141, supports our conclusion on closely similar facts. The court there noted that ordinarily a declaration that the city's actions prevented "any economical use" of the property ". . . would raise an issue as to a material fact." (*Id.* at p. 146.) However, since the complaint alleged that the property had a value of $675,000 for agricultural use, the *Brown* court found no triable issue of fact for purposes of a motion for summary judgment. (*Id.* at p. 146.) Although plaintiffs here do not allege a specific value of their land for agricultural use, such value unquestionably exists. Such has been the land's use both historically and currently, and

there is no allegation that its value for such use has been diminished. The fact that plaintiffs' dollar investment may be so great that they cannot return a profit from agriculture is simply one of the risks of the marketplace, as pointed out in *HFH*.

The fact of agricultural use completely distinguishes this case from *Eldridge* v. *City of Palo Alto* (1976) 57 Cal.App. 3d 613, heavily relied upon by plaintiffs. *Eldridge* concerned property which was among some 6,000 acres of privately owned and undeveloped foothills which were annexed to the City of Palo Alto in 1959 and promptly zoned for single-family residential use on minimum one-acre sites. (*Id.* at p. 621.) Ten years later, in 1969, the city began a series of studies and regulations which resulted in downzoning the property to minimum *ten-acre* homesites designated for "open space use" which included a host of ambiguous restrictions and provisions for public access. The *Eldridge* majority held that the complaint presented sufficient factual issues to withstand a demurrer:

> "Among the many factual issues to be resolved in the cases before us is whether the 10-acre homesites of plaintiffs' land are salable at all. This question would seem to be of particular significance, since the same homesites are designated by the ordinances for 'open space use,' including public park and recreation purposes and 'wildlife habitat.' Other factual inquiries would concern: the extent, and impact, of the intrusion upon plaintiffs' property by the 'paths and trails system' planned to allow 'public access through the Foothill lands'; whether there is any reasonable basis for the ordinances' declared aims of encouraging agricultural usage, preserving natural resources and creating

> wildlife sanctuaries on the land; and generally, the reasonableness of the ordinances' concept that although the foothills may be subdivided into 10-acre homesites, they must nevertheless without compensation therefor remain 'open space' according to the definitions and usages of Government Code section 65560. The resolution of these and other such issues will determine whether plaintiffs have in fact been denied any reasonable or beneficial use of their land." (*Id.* at pp. 628-629.)

The spectre conjured up by the various Palo Alto regulations and planning statements that property owners might be required to maintain some kind of public outdoor zoo to be traversed by hikers and birdwatchers, is simply not applicable here.[3]

B

Despite its similarities to the decisions discussed above, this case differs from them and from others like them in one remarkable respect. By governmental edict the subject lands were "improved" by the addition of immediately available sewer facilities. Through assessment and improve-

---

[3]Eldridge v. City of Palo Alto (1976) 57 Cal.App.3d 613, has been criticized. (See Comment, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law* (1977) 28 Hastings L.J. 1569.) Since this case is distinguishable, we express no view. (See also *Sizing Up Just Compensation Relief for Down-Zoning After HFH and Eldridge* (1977) 10 U.C. Davis L.Rev. 31.)

Other cases relied on by plaintiffs, including our opinion in Peacock v. County of Sacramento (1969) 271 Cal.App.2d 845, were adequately distinguished in HFH, Ltd. v. Superior Court (1975) 15 Cal.3d 508, 516-517, footnote 11, and need not be further discussed. (See also discussion of *Peacock* and *Eldridge* in Frisco Land and Mining Co. v. State of California (1977) 74 Cal.App.3d 736, 759, written by Justice Sims, who dissented in *Eldridge*.)

ment bond procedures, the lands' owners paid (or are paying) for such improvements. But by further governmental edict the improvements have become realistically unavailable and of no beneficial use to those lands. This is the first case of its kind to come to our attention, wherein government has with one hand imposed a benefit upon land, *exacting payment therefor,* then with the other hand has withdrawn all practical access to that benefit. It is this involuntary expenditure of monies by the landowner which distinguishes the case from *HFH, Avco,* and the others.

Implicit in the use of the involuntary assessment procedures to finance public improvements is the ultimate availability of those improvements for beneficial use in connection with productive possession of the assessed lands. It matters not whether such availability be conceived in terms of a vested right, a contractual right, or otherwise; we view it as a simple matter of equity and fairness. When such availability is eliminated by governmental action, we conclude that a property right has been taken for public use so as to be compensable in inverse condemnation. Plaintiffs here have been required *to pay for* a sewer and treatment plant now unavailable for their use, thus contributing more than their "proper share to a public undertaking," the long range preservation and conservation of open-space land *Holtz* v. *Superior Court* (1970) 3 Cal.3d 296, 303).

We do not view this result as inconsistent with our earlier determination that in line with *Avco* and *Raley,* vested rights are essential to an estoppel. Government is not estopped to act under the circumstances; we hold only

that where its acts, in this limited context, it must compensate.

The compensation to which plaintiffs are entitled is measured by the amount of capital contribution to the public improvement generated by their land, with interest thereon at the legal rate from and after the date or dates of its payment, less any beneficial value received by the land from the improvement. Such beneficial value, theoretical though it was, did exist after the sewer facilities were installed and up until the open space ordinance was adopted (June 7, 1973), for the sewer facilities were available for use during that interval. Some value may have persisted thereafter and may still persist, though we do not now perceive it. Such matters must be left to the determination of a factfinder.

In sum, we hold that plaintiffs can state a cause of action for inverse condemnation of the practical availability to their lands of the use of the sewer facility, measured by their (or their precedessors') capital contribution thereto, plus interest, less the monetary value of any actual benefit.

IV

LIABILITY OF THE COUNTY OF SACRAMENTO

The County of Sacramento, the Sacramento County Board of Supervisors, the Natomas Sewer Assessment District, the Natomas Sanitation District of Sacramento County, and the Sacramento Regional County Sanitation District are named defendants. These entities (hereinafter collectively referred to as County Defendants), make separate contentions as to their liability, which we uphold.

As to them the demurrers were properly sustained and the judgment will be affirmed.

As above noted, the Natomas area was annexed to the City of Sacramento on October 7, 1961 and thereafter came under the City's jurisdiction. All subsequent action which we have held gives plaintiffs a right to relief was that of the City. The only allegations involving the County Defendants are that the open-space plan was adopted with their "advice and consent, express and implied" (Webber) and their "approval and consent" (Furey). These are not sufficient allegations of such affirmative conduct as to give rise to the cause of action determined by us to exist. The amended complaints make it clear that only the City had the jurisdiction to act and only the City affirmatively acted so as to cause compensable damage.

V

DISPOSITION

The first amended complaint in the Furey case (3 Civ. 16516) sets forth five counts, the first two of which include facts sufficient for inverse condemnation as herein determined. They should however be amended on remand for the sake of clarity and certainty. The last three proceed on theories of conversion, unlawful assessment, and declaratory relief respectively; as to them the demurrer was properly sustained. The Furey judgment in favor of the City of Sacramento is reversed as to counts one and two, and otherwise is affirmed.

The first amended complaint in the Webber case (3 Civ. 16626) sets forth nine counts, the first and fifth of which

include inverse condemnation as herein determined; as in the Furey case, these should be amended on remand. The second count is for breach of contract, the third for unjust enrichment, the fourth for estoppel, the sixth and seventh for mandate, and the ninth for declaratory relief (the eighth makes allegations against County Defendants only); as to all of these the demurrer was properly sustained. The Webber judgment in favor of the City of Sacramento is reversed as to the first and fifth causes of action and otherwise is affirmed.

Both judgments are affirmed in their entirety as to the County Defendants.

Plaintiffs shall recover costs from the City of Sacramento. The County Defendants shall recover costs from plaintiffs. (CERTIFIED FOR PUBLICATION.)

PARAS J.

We concur:

PUGLIA P.J.

REGAN J.

• • • •

> of the property owners, which tax is for the benefit of the public and which tax is a special, unequal, and ununiform.
>
> "Therefore, the compensating benefit to the property owner is the warrant, and the sole warrant, for the Legislature itself to impose the burdens of these special assessments." (*Spring Street, supra,* 29-30)

Thus, it is abundantly clear that but for the *SPECIAL BENEFIT* to the property by way of increased value as a result of the assessment, the assessment *would be unconstitutional. In summary, if there is no SPECIAL BENEFIT, there can be no special assessment.*

This theory has been enunciated by the United States Supreme Court in *Norwood* v. *Baker,* 172 U.S. 269, 279:

> "In our judgment the exaction from the owner of private property of the cost of public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess,* a taking under the guise of taxation, of private property for public use without compensation." (See also *Miles Salt Company vs. Iberia Drainage District,* 239 U.S. 478; *Gast Realty vs. Schneider Granite Company,* 240 U.S. 55; *Georgia Railway and Electric Company vs. Decatur,* 295 U.S. 165; *Harrison vs. Board of Supervisors,* 44 Cal.App.3d 852 *and authorities cited therein.*)

Thus, what the City of Sacramento took from Appellants was not the sewers themselves, but rather the *SPECIAL BENEFITS* which the subject property acquired as a result of the special assessment. It is abundantly clear from the authorities cited above that had the Appellants

not been entitled to use the sewer line when the original assessment was made, that the assessment would be contrary to the Constitution. Why should the results be any different when some 7 years later (and over $350,000.00 in principal and interest being paid to the bondholders) the City decides to remove the special benefit (the use of the sewers) from the subject property?

The City would have us believe that the Appellants sole remedy was an appeal within 30 days after the assessment. (*Streets and Highways Code,* Section 5660; Petition for Hearing, Page 14.) This argument is without merit.

In *Smoke Rise vs. Washington Suburban Sanitary Commission,* 400 F.Supp. 1369, the Court dealt with the statute of limitations very similar to Section 5660 of the *Streets and Highways Code.* The *Smoke Rise* case dealt with a moratorium being placed on sewer hookups within the Defendant district. The Court held that the moratoria did not constitute a taking within the meaning of the Fifth Amendmen nor did it take property without due process of law from potential developers. However, the Court did hold that the "statute of limitations" which forced relief from assessment for lack of use at the time of the original assessment was unreasonable and a denial of due process.

The statute in question in *Smoke Rise* provided in part that the property owner must first apply for the exemption from the assessment and secondly, that the application for such exemption must be made *at the time of the original notice that an assesment is to be levied against the property.* This statute is very similar to the *Streets and Highways Code,* Section 5660 in that Section 5660 requires that an appeal from the assessment be filed within 30 days.

The *Smoke Rise* Court struck down that part of the statute holding:

> "It is likewise unreasonable to say that relief from the front-footage benefit charge must have been applied for, if at all, *at the time of the original assessment;* property owners may reasonably have believed at the time of the original assessment that the sewer moratorium would soon terminate, thereby obviating the need to apply for an exemption from the front-footage benefit charge. Consequently, this Court finds that the procedures which WSSC has adopted for administration of Section 5-1(d) of the WSSC Code are not supported by the statute itself, nor are they consistent with the due process safeguards of the Fifth and Fourteenth Amendments of the United States Constitution." (Emphasis added)

Clearly, one reason the Court struck down the WSSC Code Section was that at the time of the original assessment, the property owner may not have had any argument with the assessment. These are the facts in the case at bar. At the time the sewers were installed and the assessment made, the Appellants had no difficulty with the assessment whatsoever. It was not until the *SPECIAL BENEFIT* of the assessment was taken away from them in June of 1973 that they had any legitimate reason to complain. To require that the Appellants appeal from a set of circumstances that did not exist 7 years earlier is absurd.

The District Court of Appeal properly summarized the rationale of Appellants when it held:

> "By governmental edict the subject lands were 'improved' by the addition of immediately available sewer

facilities. Through assessment and improvement bond procedures, the lands' owners paid (or are paying) for such improvements. But by future governmental edict the improvements have become realistically unavailable and of no beneficial use to those lands. This is the first case of its kind to come to our attention, wherein government has with one hand imposed a benefit upon land, *exacting payment therefor*, then with the other hand has withdrawn all practical access to that benefit. It is this involuntary expenditure of monies by the landowner which distinguished the case from *HFH*, *AVCO*, and the others.

"Implicit in the use of involuntary assessment procedures to finance public improvements is the ultimate availability of those improvements for the beneficiary use in connection with the productive possession of the assessed lands. It matters not whether such availability be conceived in the terms of a vested right, a contractual right, or otherwise; we view it as a simple matter of equity and fairness. When such availability is eliminated by governmental action, we conclude that a property right has been

• • • •

APPENDIX H

EXHIBIT "A"

I, Stephen James Wagner, declare that:

I am an attorney duly admitted and licensed to practice law in the State of California.

I am a member of the law firm of Desmond, Miller, Desmond & Bartholomew, attorneys for Plaintiffs and Appellants herein.

That I am informed and believe and thereon allege that after the enactment of the Land Use Regulations which affect the subject property, the subject property has been without any reasonable or beneficial economic use in that it is "marginal" farmland and has been farmed on a share crop basis since the enactment of the aforementioned Land Use Regulations and has never brought in enough income to cover the taxes imposed by the City of Sacramento. That the income that has been derived from the property has only been enough to cover two-thirds to three-quarters of the annual property tax.

That in my opinion, the Complaint on file herein, if defective, can be amended so as to state a cause of action alleging facts sufficient to show that the subject property, as a proximate result of the Land Use Regulations in question, has no substantial or reasonable beneficial economic use. That these representations were made to the trial Court and the trial Court ignored them and did not allow Appellants to amend their Complaint.

That if I were called as a witness, I would be competent to testify to the foregoing unless said testimony would violate one or more canons of ethics.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 19, 1977, at Sacramento, California.

/s/ STEPHEN JAMES WAGNER
Stephen James Wagner

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-597

ERNEST E. WEBBER, NELLYS F. WEBBER
and ROBERT A. WALLER,
Appellants,
vs.
CITY OF SACRAMENTO, SACRAMENTO CITY COUNCIL,
SACRAMENTO CITY PLANNING COMMISSION,
COUNTY OF SACRAMENTO,
SACRAMENTO COUNTY BOARD OF SUPERVISORS,
NATOMAS SEWER ASSESSMENT DISTRICT,
Appellees.

Appeal From the Supreme Court of California

RESPONSE TO JURISDICTIONAL STATEMENT

DIANNA Z. HOFFMAN
609 Ninth Street
P.O. Box 590
Sacramento, California 95803
Telephone: (916) 444-9420
Attorneys for Appellees County of Sacramento, Sacramento County Board of Supervisors, and the Natomas Sewer Assessment District

L. J. SAVAGE
812 Tenth Street
Sacramento, California 95814
Telephone: (916) 449-5346
Attorneys for Appellees City of Sacramento, Sacramento City Council and Sacramento City Planning Commission

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Constitution

Statute

Text

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-597

ERNEST E. WEBBER, NELLYS F. WEBBER
and ROBERT A. WALLER,
Appellants,

vs.

CITY OF SACRAMENTO, SACRAMENTO CITY COUNCIL,
SACRAMENTO CITY PLANNING COMMISSION,
COUNTY OF SACRAMENTO,
SACRAMENTO COUNTY BOARD OF SUPERVISORS,
NATOMAS SEWER ASSESSMENT DISTRICT,
Appellees.

Appeal From the Supreme Court of California

RESPONSE TO JURISDICTIONAL STATEMENT

STATEMENT OF THE FACTS

This case arises out of an appeal by appellants Webber and Waller (hereinafter Webber/Waller) from the judgment of the California Supreme Court. The California Supreme Court held that there is no cause of action in inverse condemnation as a result of land-use regulation. The County of Sacramento (hereinafter County) has joined with the City of Sacramento (hereinafter City) in opposing

the Jurisdictional Statement but each entity will be separately represented if the case is accepted for hearing. Upon review of the facts in this case, it is apparent that the County was in no way involved in enacting the Open Space Element which Webber/Waller contend constituted a taking for which money damages are owing.

In 1961, the prior owners of the land now owned by Webber and Waller petitioner the City for installation of sewer facilities. A sewer assessment district which included the Webber/Waller land was formed by the County. This was the last action taken by the County with respect to the land owned by Webber/Waller.

Later in 1961, the Webber/Waller land was annexed to the City. The improvements were completed and the assessments confirmed in 1965.

In 1973, the City enacted the Open Space Element of its General Plan. The County played no part in the enactment or enforcement of this ordinance. In effect, the Open Space Element of the General Plan simply stated the policy that the City would not rezone the property to higher use for a period of seven years from 1973. (Paragraph 2, under "Agricultural Areas", on page C-15.)

As a result of the enactment of the Open Space Element, the Webber/Waller land would remain zoned for agricultural use—just as it had been zoned and used at all times in the past. Nevertheless, Webber/Waller claim that their land was taken without just compensation and that the benefit supporting the assessments was without just compensation.

QUESTIONS PRESENTED

1. Has a cause of action for inverse condemnation been stated against the County?

2. Has there been a "taking" of property which would entitle Webber/Waller to compensation on an inverse condemnation theory?

3. Does zoning action which merely decreases the market value of property violate the constitutional provisions forbidding uncompensated taking or damaging of property?

4. Is the decision of the California Supreme Court to deny monetary relief in this land-use regulation case consistent with cases decided by the Supreme Court?

5. Do the cases cited by appellant to support the proposition that an aggrieved property owner's primary remedy for uncompensated taking is money damages involve land-use regulations?

6. Do aggrieved property owners in the State of California have the same relief as property owners in other states who assert that land-use regulation has caused them injury?

I

NO CAUSE OF ACTION IN INVERSE CONDEMNATION HAS BEEN STATED AGAINST THE COUNTY OF SACRAMENTO

To recover in an inverse condemnation case against the County, Webber/Waller must allege and prove that the County planned, approved, constructed, or operated a pub-

lic project, or was otherwise engaged in some activity for public use or benefit. *Stoney Creek Orchards v. State,* 12 Cal.App.3d 903, 91 Cal.Rptr. 139 (1970).

The County played no part in the enactment or enforcement of the Open Space Element. Webber/Waller claim that it was this ordinance that deprived them of the beneficial use of their property. Since the County was not in any way responsible for the Open Space Element, there is no cause of action for inverse condemnation against the County.

II

THERE HAS BEEN NO "TAKING" OF PROPERTY WHICH WOULD ENTITLE WEBBER/WALLER TO COMPENSATION ON AN INVERSE CONDEMNATION THEORY

Webber/Waller cite *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393 (1922) for the proposition that inverse condemnation is a remedy available in zoning cases. Justice Holmes' states in *Pennsylvania Coal Company* that ". . . while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at page 415. Justice Holmes uses the word "taking" to indicate the limit for land control by regulation before it becomes a "taking" by power of eminent domain.

This Court set aside the injunctive relief which had been granted by the Pennsylvania courts and declared void the exercise of police power which had limited the company's right to mine its land. The Court never mentioned that the power of eminent domain had been exercised, nor was the possibility of compensation even considered. Therefore,

Pennsylvania Coal Company cannot be used as support for the proposition that money damages based on inverse condemnation are available in zoning cases.

It is true as explained by Webber/Waller (Jurisdictional Statement at page 19) that but for the special benefit to the property by way of increased value, the special assessment would be unconstitutional as unequal taxation. It is not true, however, that when such availability is eliminated by governmental actions, a property right has been taken for public use so as to be compensible in inverse condemnation (Jurisdictional Statement at page 19).

In *Norwood v. Baker,* 172 U.S. 269 (1898), certain lands were condemned for opening of a street. An assessment was made on the appellee's land abutting on each side of the new street in an amount covering not simply a sum equal to that paid for the land taken for the street, but in addition costs and expenses connected with condemnation proceedings. The court held that ". . . there could be no justification for any proceeding which charges the land with an assessment greater than the benefits. It is a plain case of appropriating private property to public uses without compensation." *Id.* at 280. The proper remedy, however, was not inverse condemnation but instead to enjoin enforcement of the assessment that infringed upon the constitutional rights of the appellees. *Id.* at 291. The court said there was an improper assessment but no provision for damages based on an inverse condemnation theory was allowed. *Id.* at 296-97.

Therefore, the California Supreme Court has correctly decided that there is no right to recovery based on an inverse condemnation theory in zoning cases. This decision is in accordance with federal cases as decided by this Court. *See, e.g., Pennsylvania Coal Company v. Mahon,* 260 U.S. 393 (1922); *Norwood v. Baker,* 172 U.S. 269 (1898).

III

ZONING ACTION WHICH MERELY DECREASES THE MARKET VALUE OF PROPERTY DOES NOT VIOLATE THE CONSTITUTIONAL PROVISIONS FORBIDDING UNCOMPENSATED TAKING OR DAMAGING OF PROPERTY

The Webber/Waller land had always been used for agricultural purposes. Despite Webber/Waller's contention that the land is not valuable as farming land, the soil is perfectly suitable for agricultural purposes. Since there has been no deprivation of all reasonable use of the land in question, there has been no taking without compensation. In *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) the appellee claimed that the land in question had a market value of $10,000 per acre if used for industrial uses, but if the use be limited to residential purposes, the market value would not be in excess of $2,500 per acre. *Id.* at 384. The Court upheld the zoning regulation against the claim that it constituted a taking of the property in question.

IV

THE DECISION OF THE CALIFORNIA SUPREME COURT TO DENY MONETARY RELIEF IN THIS LAND-USE REGULATION CASE IS CONSISTENT WITH CASES DECIDED BY THE UNITED STATES SUPREME COURT

Webber/Waller assert that this court, in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 435 U.S. 1301 (1979), acknowledged the property owners' plea for monetary relief in zoning regulation cases. Webber/Waller further assert that since the Federal Courts have allowed monetary relief and the California Supreme Court has denied such, in effect there will be a vast transfer of local land use cases to the Federal Court system. This might very well be true if *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency* dealt with the specific issue of whether land use regulations can result in a taking which must be compensated.

In *Lake Country Estates, Inc.*, California and Nevada entered into a compact to create Tahoe Regional Planning Agency (hereinafter TRPA) which was to coordinate and regulate development in the Lake Tahoe Basin Resort Area and to conserve its natural resources. TRPA adopted a land-use ordinance that destroyed the value of petitioner's property in violation of the Fifth and Fourteenth Amendments. The central issue in this case was whether the individual respondents who enacted this land-use ordinance and carried it out were immune from liability for conduct of alleged legislative character and qualifiedly immune for executive action. Although the court makes reference to the finding of the district court that a sufficient cause of action

for inverse condemnation had been stated, this issue is never addressed in the opinion of the Supreme Court. Therefore, it can hardly be said that *Lake Country Estates* stands for the proposition that monetary relief is available in land-use regulation cases.

In addition, Webber/Waller cite *Gordon v. City of Warren*, 579 F.2d 386 (1978, 6th Circuit); *Barbaccia v. County of Santa Clara*, 451 F.Supp. 260 (1978, N.D. Cal.); *Sanfiliop v. County of Santa Cruz*, 415 F.Supp. 1340 (1976, N.D. Cal.); *Dahl v. City of Palo Alto*, 372 F.Supp. 647 (1974, N.D. Cal.), as examples of lower federal courts which have acknowledged the property owners' plea for monetary relief in zoning regulation cases. Again, the property owners' plea for monetary relief has been acknowledged, but money damages were not allowed absent actual physical damage or invasion, confiscatory intent or bad faith on the part of the government. To award money damages, the court must find that the regulations in question allow no reasonable use of the complainants' property or are exceptionally restrictive.

In the case at bar, neither physical damage or invasion, nor confiscatory intent or bad faith on the part of the government has been alleged. The Open Space Element still allows reasonable use of the property for agricultural purposes. The California Supreme Court denied money damages because there has been no physical invasion or unreasonable regulation. The decision of the California Supreme Court is thereby identical to decisions in similar cases by the Supreme Court of the United States: Money damages are not allowed in the absence of a "taking".

V

AN AGGRIEVED PROPERTY OWNER IN THE STATE OF CALIFORNIA HAS THE SAME RELIEF AS PROPERTY OWNERS IN OTHER STATES WHO ASSERT THAT LAND-USE REGULATIONS CAUSED THEM INJURY

Webber/Waller complain that the decision of the California Supreme Court denying monetary relief in land-use regulation cases like the one at bar is inconsistent with the decisions of other district courts. They assert that the same property owner in other states would have a right to damages in inverse condemnation for the same land-use regulations. (Jurisdictional Statement at p. 30.)

Webber/Waller then go on to cite cases where aggrieved property owners have allegedly recovered money damages in inverse condemnation cases as a result of land-use regulations. Webber/Waller use the language " . . . in inverse condemnation for *admittedly* confiscatory land-use regulations". The word "admittedly" is important because in all the cases cited by Webber/Waller, there has been some substantial taking of the property in question which was "admittedly" confiscatory. *Lomarch Corp. v. City of Englewood*, 237 A.2d 471 (1968, N.J.) (Upon a municipality taking title, there shall be payment); *Hermanson v. Board of County Commissioners, etc.*, 595 P.2d 694 (1979, Colo.) (Regulations designed to depress value with a view to future acquisition) There are no "admittedly" confiscatory land-use regulations involved in the instant case.

In the case at bar, there has been no taking either in the form of physical invasion or a substantial deprivation

of property use constituting a taking. In *Village of Willoughby Hills v. Corrigan*, 278 N.E.2d 658 (1972, Ohio), *cert. denied, sub. nom.*, the court held that airport zoning regulations restricting buildings on plaintiff's land to 70 feet did not constitute an unconstitutional taking. In *Moviematic Industries, Inc. v. Dade County*, 349 So.2d 667 (1977 Fla.), the court held that a county resolution rezoning the corporation's property from heavy industrial use to single-family residential use did not render the land valueless and, therefore, did not amount to a constructive taking. The court further went on to say that it is not necessary to permit the highest and best use of land in order to avoid liability for inverse condemnation.

Despite the fact that Webber/Waller cite the above cases claiming that they stand for propositions different than those followed by the California Supreme Court, these cases actually stand for propositions which have been followed by the California Supreme Court. There is no disagreement among the courts. If there has been a "taking", money damages are available. If there has not been a "taking", money damages are not available. There has been no "taking" in the case at bar.

Webber/Waller then cite *Kmiec v. Town of Spider Lake*, 211 N.W.2d 471 (1973, Wis.) and *Fred F. French Investing Company v. City of New York*, 39 N.E.2d 381 (1976, N.Y.) claiming that these cases are examples of decisions by federal courts which represent different interpretations of the United States Constitution than that presently followed by the California Supreme Court.

On the contrary, these cases stand for the proposition that:

> "In all but exceptional cases, nevertheless, such a regulation is not equal to a taking and is, therefore, not compensable, but amounts to a deprivation or frustration of property rights without Due Process of law and is, therefore, invalid. *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 385 (1976, New York).
>
> ". . . The goal of challenging land use disputes is to preclude application of the measure to the restricted parcel on the basis of constitutional infirmity. What is achieved is declaratory relief, the sole exception to this mild outcome occurs where the challenge measure is either intended to eventuate in actual public ownership of the land or has already caused the government to encroach on the land with trespassory consequences that are largely irreversible." *Id.* at 385 (quoting Costonis, "Fair" Compensation and the Accommodation Power: Antedotes for the Taking of Empasse in Land Use Controversies, 1975, Col. L. Rev. 1021, 1035.)

This is exactly the rationale followed by the California Supreme Court.

After having reviewed the authority cited by Webber/Waller, none of these cases are in direct conflict with the present stance of the California Supreme Court. Therefore, there is no danger that the remedy for violation of the Federal Constitution will be different in one state than another.

VI

THE CALIFORNIA SUPREME COURT DID PROVIDE AN ADEQUATE REMEDY FOR WEBBER/WALLER

Webber/Waller challenge the assessment to install sewer facilities on the ground that it was unreasonable to assess the property and then not allow the property owners to benefit from this assessment. It is difficult to characterize this challenge as "inverse condemnation", but this is not to say that Webber/Waller should go uncompensated.

The California Supreme Court did, in fact, fashion a remedy for Webber/Waller. The remedy was to return Webber/Waller to the status quo. According to this remedy, either the property must be reassessed in a manner to relieve Webber/Waller for inequitable assessments or the Open Space Element of the General Plan is to be invalidated leaving Webber/Waller with that which they had at all times, approximately 350 acres of farm land zoned for that use and located in several square miles of other farm land.

The Open Space Element of the General Plan was adopted by the City of Sacramento as a municipal ordinance and this court has held that local ordinances are state statutes for the purposes of 28 U.S.C. 1257(2). *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 207 n.3 (1975).

Although the aforementioned remedy is stated in the alternative in the California Supreme Court opinion, there can be no argument that the mandatory remedy is invalidation of the state statute. Therefore, this issue fails to

meet the requirements of 28 U.S.C. 1257(2) which requires that the state statute be held valid to be eligible for appeal to this court.

The clear precedent of the United States Supreme Court supports the conclusion of the California Supreme Court on the issue of whether Webber/Waller's land was taken without just compensation. Since the state statute involved was invalidated, the issue regarding the assessment loss should not be reviewed by this court on appeal. 28 U.S.C. 1257(2).

CONCLUSION

For all the foregoing reasons, the City and County of Sacramento respectfully submit that the Court should dismiss this matter.

Dated: November 9, 1979

DIANNA Z. HOFFMAN
Attorneys for Appellees County of Sacramento, Sacramento County Board of Supervisors, and the Natomas Sewer Assessment District

L. J. SAVAGE
Attorneys for Appellees City of Sacramento, Sacramento City Council and Sacramento City Planning Commission